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OF

LEADING CASES

ON

VARIOUS BRANCHES OF THE LAW:

BY

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THE NINTH EDITION

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NINTH AMERICAN, FROM THE NINTH ENGLISH EDITION,

WITH ELABORATE AMERICAN NOTES TO DATE BY THE DISTINGUISHED AUTHORS NAMED IN THE PUBLISHERS' PREFACE.

"It is ever good to rely upon the book at large; for many times, Compendia sunt dispendia, and Melius est petere fontes quam sectari rivulos."—1 INST. 305 b.

IN THREE VOLUMES.—VOL. II.

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KEECH v. HALL.

MICH. - 19 GEO. 3.

[REPORTED DOUGL., 21.]

A mortgagee may recover in ejectment, without giving notice to quit against a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee.

[See now Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 18.]

EJECTMENT tried at Guildhall, before *Buller*, Justice, and verdict for the plaintiff. After a motion for a new trial or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider; and now Lord *Mansfield* stated the case, and gave the opinion of the court as follows:

Lord Mansfield — This is an ejectment brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (Belcher v. Collins); but there the mortgagee was privy to the lease, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rackrent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration a court of equity must follow, not lead the law. On full consideration we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money he could not maintain this action (a); but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds. In practice, indeed (especially in the case of great estates), that is not often done, because the tenant relies

⁽a) Vide Cowp. 473.

on the honour of his landlord; but, whenever one of two innocent persons must be a loser, the rule is, qui prior est tempore potior est jure. If one must suffer it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenants, in an action of trespass (a), which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment (b).

The Solicitor-General for the defendant.—Dunning and Cowper for the plaintiff.

The rule discharged.

The point decided in this case has been since frequently confirmed. See *Doe* v. *Giles*, 5 Bing. 421; *Doe* v. *Maisey*, 8 B. & C. 767; *Thunder* v. *Belcher*, 3 East, 449; *Smartle* v. *Williams*, 3 Lev. 387; 1 Salk. 245. [*Gibbs* v. *Cruickshank*, L. R. 8 C. P. 454, 42 L. J. C. P. 273; *Dows* v. *Telford*, 1 App. Cas. 414, 45 L. J. Ex. 613.

It is, however, of comparatively small importance since the passing of the Conveyancing Act, 1881, which, by s. 18, gives power to the mortgagor and mortgage respectively, if in possession, to grant valid leases, subject, however, to certain qualifications and restrictions. That section is as follows:—

- (a) [In Litchfield v. Ready, 5 Exch. 939, it was held that such action would not lie; but see Barnett v. Guilford, 11 Exch. 19.]
- (b) When the question was argued at the bar, Lord Mansfield said he entirely approved of what had been done by Nares, Justice, upon the Oxford Circuit, and afterwards confirmed by this court, in the case of

White v. Hawkins, viz., not to suffer a lessee under a lease prior to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee did not intend to turn him out of possession. This doctrine is, however, long since overruled. See Roe v. Reade, 1 T. R. 118; Doe v. Staple, 8 T. R. 684.

- "18 (1). A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised.
- "(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.
 - "(3.) The leases which this section authorises are:—
 - "(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and
 - "(ii.) A building lease for any term not exceeding ninety-nine years.
- " (4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.
- "(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.
- "(6.) Every such lease shall receive the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.
- "(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.
- "(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.
- "(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.
- "(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.
- "(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.
- "(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding.
- "(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgager and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing, and to the provisions therein contained.
- "(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects

and conveyances, unless a contrary intention is expressed in the mortgage deed.

- "(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.
- "(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgager and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.
- "(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

The doctrine in *Keech v. Hall* is, however, still binding in all cases of leases not falling within the provisions of the Conveyancing Act, 1881, and it has been thought desirable, notwithstanding the passing of that Act, to retain the note, dealing as it does to a great extent with the relations *inter se* of the mortgagor and mortgagee, irrespectively of the rights which may be created by leases granted to third persons.

And first, apart from the Conveyancing Act, 1881], when once it has been proved that the mortgagee has recognised the tenant of the mortgagor as his tenant, he cannot treat him as a tort feasor, nor if he elect to treat him as a tort feasor, can he maintain any demand against him in which he is charged as a tenant; for *Birch* v. *Wright*, 1 T. R. 378, clearly establishes that a man cannot be treated at once both as a tenant and a trespasser.

[The cases of *Doe* d. *Rogers* v. *Cadwallader*, 2 B. & Ad. 473, and *Doe* d. *Whittaker* v. *Hales*, 7 Bing. 322, are important on the question of what amounts to such a recognition.]

In Doe dem. Rogers v. Cadwallader [which was an action of ejectment by mortgagee against tenant of mortgagor], the wife of the lessor of the plaintiff had become mortgagee of the premises in question, by a deed, dated the 7th of May, 1828. Interest was payable on the 25th of December every year; and had been paid up to the 25th of December, 1830; the demise was on the 1st of July, 1830, and the defendant, who had been let into possession after the mortgage by the mortgagor, contended that the action was not maintainable because it was not competent to a mortgagee to treat the mortgagor or his tenants as trespassers, at any time during which their lawful possession had been recognised by him; and that, by receiving the interest of the mortgage-money, on the 25th of December, 1830, he had acknowledged that up to that time the defendant was in lawful possession of the premises; but the court gave judgment for the plaintiff on the ground that the receipt of interest was no recognition of the defendant as a person in lawful possession of the premises.

However, in *Doe* d. *Whittaker* v. *Hales*, Austin, having mortgaged the premises to the lessor of the plaintiff, let them to the defendant. The mortgagee directed his attorney to apply to Austin for the interest; and the attorney in April, 1830, applied to the defendant for rent to pay the interest, threatened to distrain if it were not paid, and received it three or four times. The learned judge at the trial, and the court *in Banco* afterwards, held that

these facts amounted to a recognition that the defendant was lawfully in possession in April, 1830, and consequently that he could not be treated as having been a trespasser on December 25, 1829, the day on which the demise was laid. See *Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241.

Lord Tenterden, delivering judgment in Doe v. Cadwallader, took some pains to distinguish that case from Doe d. Whittaker v. Hales.

Upon the whole the question whether the mortgagee have recognised the tenant of the mortgagor as his tenant appears to be a question more of fact than of law, and probably would be left to the consideration of the jury, providing there were any evidence fit to be submitted to them. And the decision in Doe v. Cadwallader seems to establish that mere receipt of interest by the mortgagee, coupled with no other fact whatever, would not be evidence fit to be left to the jury on the question of recognition. The ruling in Doe v. Cadwallader, it must, however, be observed, seems to have been thought too severe by Lord Denman in Evans v. Elliot, 9 A. & E. 342. It seems, however, from a prior part of his lordship's judgment, that the three other judges were disposed to adhere to the opinion expressed in Doe v. Cadwallader.

[Next, there is a class of cases in which it has been held that the mortgage, though not specifically creating a tenancy, operated as a redemise to the mortgagor, thus giving the latter a fresh power to demise, irrespectively of the provisions of the Conveyancing Act, 1881. Thus it] often happens that there is an express covenant in a mortgage deed, that the mortgager shall remain in possession of the premises until default in payment of the mortgage-money at a certain period. Up to that period he seems to hold an interest in the nature of a term of years; and, of course, during that period he has a right to the possession, and could not be legally ejected; Wilkinson v. Hall, 3 Bing. N. C. 508; the stipulation that he should remain in possession operating as a redemise. When that fixed period has expired, he becomes, if the money have not been paid, tenant at sufferance to the mortgagee. "We must look," said Best, C. J., delivering judgment in such a case, "at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between the parties, that possession of his estate is secured to him until a certain day, and that, if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same." 5 Bing. 427.

And, attending to the distinction between an agreement to be collected from the mortgage deed that the mortgagor shall remain in possession for a time certain, which operates as a redemise, and an agreement that the mortgage may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, which agreement cannot operate as a redemise for vant of certainty (Com. Dig. Estate, G. 12), the view taken in Wilkinson v. Hall seems not to be at variance with the more recent decisions in Doe d. Roylance v. Lightfoot, 8 M. & W. 564, and Doe d. Parsley v. Day, 2 Q. B. 147, though extended too widely in Doe d. Lister v. Goldwin, 2 Q. B. 143.

As for Wheeler v. Montefiore, 2 Q. B. 133, explained by the court in Doe d. Parsley v. Day, 2 Q. B. 155, it has no bearing upon the question; because the

mortgage, in that case, was for a term of years, the mortgagee had never entered, and the action was of *trespass*: which form of action cannot be maintained by a lessee for years before entry; although he may bring an ejectment, because in that proceeding the *right* to the possession only is in question. [See *Harrison* v. *Blackburn*, 34 L. J. C. P. 109.

In Turner v. Cameron's Coalbrook Steam Coal Co., 5 Exch. 932, 20 L. J. Exch. 71, the mortgage does not appear to have been for years or a less estate, and the court was of opinion that the mortgagee could not maintain trespass before entry, because he had not entered; and see per Parke, B., Litchfield v. Ready, 5 Ex. 919, 945; Com. Dig. Trespass, B. 3. In Litchfield v. Ready it was held that he could not after entry maintain trespass for mesne profits before entry, against the mortgagor's tenant after mortgage. It is to be observed, however, that Parke, B., in giving judgment in the case of Litchfield v. Ready, proceeds upon the ground that the doctrine of relation back of possession to title is confined entirely to the case of disseisor and disseisee, a view which the same learned judge modified in the later case of Barnett v. Guilford, 12 Ex. 19, where the doctrine was applied in the case of entry by the heir on an abator. In the case of Anderson v. Ratcliffe, E. B. & E. 806-819, the doctrine was applied, in the case of entry, by the assignee of a term. But in the judgment of the Court of Exchequer Chamber the case of mortgagor and mortgagee would seem to be put upon a distinct and special footing. See S. C. 29 L. J. Q. B. 128.]

In Doe d. Lyster v. Goldwin, 2 Q. B. 143, a conveyance was made of the legal estate, by Lyster and his wife, (in whose right he enjoyed the property,) in order "to secure an annuity upon which money had been advanced by the Globe Insurance Office;" and it was in trust, amongst other things, to permit and suffer Mrs. Lyster to receive the rents until default made for sixty days in payment of the annuity; and, no default appearing, it was held that the legal estate remained by way of redemise in Lyster. But, to cite the observation of the court in a subsequent judgment, (Doe d. Parsley v. Day, 2 Q. B. 155,) "it may be questionable whether sufficient attention was paid in that case to the point as to the certainty of the time: at all events it was not decided upon any ground that such certainty was immaterial." And it may be further observed, upon Doe d. Lyster v. Goldwin, that the nature of the transaction does not appear very distinctly, and the conveyance seems not unlikely to have been simply a demise or assignment of a term to secure the annuity, and so to have admitted of considerations different from those which govern the case of an ordinary mortgage. (See Jacob v. Milford, 1 J. & W. 629; Doe d. Butler v. Lord Kensington, 8 Q. B. 429.)

In Doe d. Roylance v. Lightfoot, 8 M. & W. 553, the proviso was, that if the mortgagor should well and truly pay the principal money and interest on the 25th of March then next, the mortgagee should reconvey, and there were covenants that after default the mortgagee might enter, and also after default for further assurance. The Court of Exchequer, referring to the passage in Shepherd's Touchstone presently to be stated in full, and observing that it was not brought to the attention of the court in Wilkinson v. Hall, held that the estate was in the mortgagee from the time of the execution of the mortgage, and that the statute of limitations began to run at that time.

In *Doe* d. *Parsley* v. *Day*, 2 Q. B. 147, freeholds and leaseholds were conveyed in mortgage with a proviso that upon payment of 550l. and interest on the 5th of October then next the conveyance should be void, but in case of non-payment it was to be lawful for the mortgagee, after a month's notice in

writing demanding payment, to enter into possession, and to make leases and seli, and there was a covenant by the mortgagee not to sell or lease until after such notice. The Court of Queen's Bench, following the authority of the passage in the Touchstone, referred to by Parke, B., in *Doe d. Roylance v. Lightfoot*, and acceding to the doctrine of that case, came to the conclusion that, inasmuch as after the day of payment, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain; neither was there any affirmative covenant whatever that he should hold at all: "the covenant, therefore, that the mortgagee shall not *sell* or *lease*, or even if it be construed should not *enter*, until a month's notice, was a covenant only and no lease."

The passage in Shep. Touch. (8th ed.) 272, referred to in Doe d. Roylance v. Lightfoot, was cited at length, and commented upon in the judgment in Doe d. Parsley v. Day, as follows: - "If A. do but grant and covenant with B., that B. should enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. licence B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feofiment in fee, or other estate upon condition, that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter, to the end, that in this case the feoffor, &c., may have the land, and continue in possession until that time, to make a covenant that he shall hold, and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the uncertainty of the time, whereunto care must be had, do not make it void. (Mr. Preston adds, 'The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.') And, therefore, if A. bargain and sell his land to B. on condition to re-enter if he pay him 100%, and B. doth covenant with A. that he will not take the profits until default of payment; or that A. shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease ('for want,' says Mr. Preston, 'of a more formal contract, and also for want of certainty of time'). And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only ('since,' says Mr. Preston, 'the words are negative only, and not affirmative'). Precisely the same law is laid down in Powseley v. Blackman, Cro. Jac. 659; Evans v. Thomas, Cro. Jac. 172; Jemmot v. Cooly, 1 Lev. 170; S. C. 1 Saund. 112, b., 1 Sid. 223, 262, 344; Sir T. Raymond, 135, 158; Keb. 784, 915; 2 Keb. 20, 184, 270, 295."

It may perhaps be concluded, on this review of the authorities, that in order to make a redemise, there must be an *affirmative* covenant, that the mortgagor shall hold for a *determinate* time; and that where either of those elements is wanting, there is no redemise.

A mortgage deed sometimes contains [a specific] agreement that the mortgager shall be tenant to the mortgagee at a rent; or a power enabling the mortgagee to distrain, by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest [and if so provided the principal, Ex parte Harrison, 18 Ch. D. 127], an object more completely effected by adopting the former than the latter mode of framing the deed; because, whilst the former makes the mortgagor tenant to the mortgagee and creates a rent properly so called, with all its incident remedies

[Anderson v. Midland Rail. Co., 30 L. J. Q. B. 94; see Jolly v. Arbuthnot, 4 De G. & J. 224; Morton v. Woods, L. R. 4 Q. B. 293, 38 L. J. Q. B. 81; Daubuz v. Lavington, 13 Q. B. D. 347; In re Threlfall, Ex parte Queen's Benefit Society, 16 Ch. D. 274, 50 L. J. Ch. 318, sub nom. Ex parte Blakey; Ex parte Voisey, 21 Ch. D. 442; Kearsley v. Philips, 11 Q. B. D. 621, where Brett, M. R., quotes the above passage in extenso with approval; 52 L. J. Q. B. 581], the latter mode operates merely by way of personal licence from the mortgagor, and affects his interest only. The former mode, however, is open to the objection that the tenancy created [unless apt words to the contrary are used in the instrument, see In re Threlfall, Ex parte Queen's Benefit Society, supra] is at will, and consequently the rent precarious; and to the more practical one, that the deed containing it may possibly be held to require a lease stamp. See 18 Jurist, part 2, p. 150.

The effect of either mode of framing the deed upon the [original] subject of this note, viz., the right of the mortgagee to bring ejectment, must, in each case, depend upon the terms in which it is framed. [Further, the terms of the deed of mortgage are important in considering a series of cases noted later on, in which the question has been discussed whether instruments of mortgage purporting to create the relation of landlord and tenant between mortgagee and mortgagor have really had that effect so as to give the mortgagee the rights of a landlord as against other creditors of the mortgagor on the bankruptcy of the latter.]

In Doe d. Garrod v. Olley, 12 A. & E. 481, it was agreed that the mortgagor, during his occupation of the premises, should pay the mortgagee a rent of 50l. a year, with such power of distress as landlords have on common demises, provided that the reservation of rent should not prejudice the mortgagee's right to enter after default in payment of the moneys secured or any part thereof. The mortgagee, after the principal had fallen due, distrained for half a year's rent, and upon a subsequent default in payment of rent, the principal still remaining due, he, without any notice to quit, brought an ejectment, and succeeded. Patteson, J., in that case, expressed his opinion that it could not be meant that the 50l. should be a rent-charge, because the mortgagor had no estate in him, and that it seemed "as if the relation of landlord and tenant was contemplated, but with liberty for the landlord to treat the tenant as a trespasser at any time after any default." That decision was confirmed and acted on in Doe d. Snell v. Tom, 4 Q. B. 615.

In *Doe_d. Basto* v. *Cox*, 11 Q. B. 122, the mortgagor agreed to become tenant "henceforth at the will and pleasure of the mortgagee, at the yearly rental of 25t. 4s. payable quarterly," which agreement was held to create a tenancy at will, not converted into a tenancy from year to year by occupation for two years and payment of rent.

[In The Metropolitan Counties, &c., Society v. Brown, 4 H. & N. 428, powers of sale and entry after default on a certain day were given by the mortgage deed, which provided that "to the intent that the mortgagees might have for the recovery of interest on the principal money the same powers of entry and distress as are given to landlords for the recovery of rent in arrear," the mortgagor "did thereby attorn and become tenant from year to year of the premises to the mortgagors at a yearly rent payable half-yearly. Nevertheless, in the event of any sale under the powers thereinbefore contained," the attornment and tenancy thereby created was, "as regards such portion of the premises as should be sold to be at an end; and that without any previous notice to put an end to the same." This mortgage having been assigned, the

assignees after default in payment on the day named, without giving the mortgagor six months' notice to quit, served him with a notice of entry, and on his refusal to give up possession brought an ejectment against him, which action was held maintainable. "The clause of attornment," said Pollock, C. B, "did not create a tenancy from year to year with all its incidents, and looking at the deed in its entirety, the true construction is that the right of entry overrides the other provision, and therefore, notwithstanding the tenancy thereby created, the mortgagee may re-enter on default of payment of the interest." The majority of the court seem to have been of opinion that such form of mortgage creates a tenancy from year to year, determinable on the part of the mortgagees without notice to quit.

Where a mortgage deed, which was never executed by the mortgagees, contained an attornment by the mortgagor for the term of ten years, with a proviso that the landlord (the mortgagee) might enter and determine the term at his will, it was urged, on the authority of Brooke's Abridgement, tit. Lease 13, that the proviso must be rejected as repugnant, and there being no deed executed that the term for ten years would be void. But the court held that though this might be so in the ordinary case of a lease, yet, looking to the whole object and scope of the deed in question, a tenancy was thereby created so as to support a distress by the mortgagee. Morton v. Woods, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81. As to the exact nature of the tenancy, see per Lush, L. J., in Ex parte Punnett, 16 Ch. D. 226, 50 L. J. Ch. 212, where this case was expressly followed by the C. A.

Similarly in *In re Threlfall*, 16 Ch. D. 274; 50 L. J. Ch. 318, where the mortgage deed contained an attornment clause whereby the mortgagors "did attorn and become tenants from year to year to" the mortgagees, with a proviso that the mortgagees might at any time after a certain date, without notice, take possession of the mortgaged premises, it was held by the C. A. that there was no repugnancy between these two clauses, and that a tenancy from year to year in the mortgagors was created which supported a distress by the mortgagees. See also *Ex parte Voisey*, 21 Ch. D. 442; 52 L. J. Ch. 121.

Where a mortgage deed provided that the mortgagor in the event of his making default should "immediately or at any time after such default" hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed, at a specified rent, it was held that the mortgagor did not, after default, become tenant so as to give the mortgagees a right of distress, until after some communication by them to him of the change they had resolved to make in the terms upon which his possession was suffered to continue. Clowes v. Hughes, L. R. 5 Ex. 160; 39 L. J. Ex. 62.]

In [these] cases, the relation of landlord and tenant appears to have at first existed; but there have been others of a like character, in which a mere personal licence to distrain, or a rent-charge (afterwards merged by the acquisition of the legal estate), has been given to the mortgagee. Thus in Doe d. Wilkinson v. Goodier, 10 Q. B. 957, there was a power in the mortgagee to distrain for interest if in arrear twenty-one days, "in like manner as for rent reserved on a lease;" and though the mortgagee had entered and distrained after the day of the demise in ejectment, but for interest due before that day, he was considered not to have recognised the mortgagor as his tenant, and to be entitled to maintain ejectment.

In Freeman v. Edwards, 2 Exch. 732, the mortgage, which was of copyhold, contained a similar power to distrain for interest; the mortgagee was ad-

mitted to the copyholds: the mortgagor became bankrupt, and whilst he still remained in possession, the mortgagee distrained for interest in arrear; for which act the assignees of the mortgagor sued in trespass. The mortgagee pleaded a justification under the deed, which plea was held bad after verdict. The arguments advanced on either side, and the view taken by the court of the operation of such power, appear fully in the following passage from the judgment of Parke, B.: [as reported in 17 L. J. Ex. 261] - "The utmost effect that can be given to this deed, is to consider it as operating as a covenant that the mortgagee may seize such goods of the mortgagor as shall be on the premises at the time the distress is made, and treat them as if distrained; such a covenant would not affect any specific goods before seizure, and therefore the goods came to the assignees not subject to any equity. Probably, the argument that the grant operated so as to create a rent-charge is correct; and if so, the rent-charge continued until the surrender and admittance. But it is not necessary to decide that, for as soon as the grantee of the rent-charge, if it was one, became entitled to the fee simple in possession, the rent-charge was gone, and the covenant ceased to exist as an obligation binding the land. It might, however, still exist as a personal covenant, binding the covenantor, though it would not affect third persons. The argument of the plaintiff's counsel, that the effect of the deed was exhausted by the creation of the rent, may make this doubtful; and it is not necessary to decide it, for, giving the covenant this effect, it will not make this a good plea. The covenant at most is to be construed as an agreement that all goods belonging to Leedham (the mortgagor) at the time of the distress, and then upon the land, might be seized. This would affect his own goods when seized. Up to the seizure the whole is contingent, and gives no lien on specific goods. Before the distress was made, Leedham became bankrupt; at that time the whole of the goods which were his property, and then upon the land, were contingently liable to be seized, but no specific portion was liable more than the rest. There was, therefore, no lien on any portion of the goods, according to the principle of the decision in Carvelho v. Burn, 4 B. & Ad. 382 (1 A. & E. 883). Then at the moment of the distress the goods had ceased to belong to Leedham, and became the property of the assignees, and, as goods not belonging to the covenantor, were not subject to the covenant." See also Chapman v. Beecher, 3 Q. B. 723.

[A personal licence to distrain should seem not to be transferable, and the assignee of the mortgage could not justify a seizure under it as a servant of the mortgagee. (See *Brown v. The Metropolitan*, &c., Society, 1 El. & El. 832, 28 L. J. Q. B. 236.)

In certain cases the courts have held, on various grounds, that the mortgage deed, though purporting to create a tenancy in the mortgagor, had not that effect. Thus] in Walker v. Giles, 6 C. B. 662, where a conveyance to the trustees of a building society, to secure payment of subscriptions, contained a clause whereby the mortgagor agreed to become tenant to the trustees of the premises, thenceforth "during their will, at the net yearly rent of 2007., payable on the usual quarter days; the Court of Common Pleas held that there was no tenancy, the general scope of the deed being inconsistent with such a construction, since, if there was a tenancy, the mortgag[or] might be called upon to pay both the subscriptions and the rent. This case seems, however, open to the animadversion which it has called forth in the 13 Jurist, part 2, p. 463, and 17 Jurist, part 2, p. 149; and the court appears to have disregarded the express intention of the parties, in order to avoid the fancied

injustice of the trustees having the power (subject to the control of a court of equity) to recover their debt twice over, in other words, to treat the rent as a security for payment of the subscriptions. And in the more recent case of Pinhorn v. Souster, 8 Exch. 763, where the deed more fully, though scarcely more clearly, than in Walker v. Giles, expressed the intention that a tenancy at will should be created, and stipulated that the mortgagee should apply the rent in satisfaction of the rent due from the mortgagor to his superior landlord, and in satisfaction of the principal and interest, and pay the surplus, if any, to the mortgagor, the Court of Exchequer [distinguishing Walker v. Giles] held that a tenancy at will was created, in respect of which the mortgagee might distrain; and further, that such tenancy was not put an end to by assignment of the mortgagor's interest without notice to the mortgagee. [In Brown v. The Metropolitan, &c., Society, 28 L. J. Q. B. 236; 1 El. & El. 832; the court expressed an opinion that Walker v. Giles could only be supported, if at all, on the ground, pointed out by Lord Wensleydale in Pinhorn v. Souster, that the tenancy and power of distress were inconsistent with the other provisions of the deed. See also Turner v. Barnes, 2 B. & S. 435; 31 L. J. Q. B. 170. Ex parte Harrison, 18 Ch. D. 127.

Again, there have been cases in which the courts have held that no tenancy was created so as to support a distress, when it appeared, from the terms of the mortgage, that it was never the intention of the parties to create a real tenancy, but that the attornment clause was a mere device to defeat the bankruptcy law by giving the mortgagee a preference over the mortgagor's other creditors.

This was held to be the case where the rent nominally reserved was extravagantly high as compared with the real value of the mortgaged premises, Ex parte Williams, 7 Ch. D. 138; Ex parte Jackson, 14 Ch. D. 725, distinguished in Ex parte Voisey, 21 Ch. D. 442; 52 L. J. Ch. 121, where the subject is fully discussed by the C. A. See also In re Stockton Iron Furnace Co., 10 Ch. D. 335.

By the Bills of Sale Act 1878 (41 & 42 Vict. c. 31), s. 6, it is provided that "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

"Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

The above provision, coupled with the additional stringency of the Bills of Sale Amendment Act, 1882 (45 & 46 Vict. c. 43), as to bills of sale in general, may probably render such clauses of less frequent occurrence in mortgages in the future. However, in the case of Hall v. Comfort, 18 Q. B. D. 11, it was held that a mortgage deed, containing an attornment clause, was not rendered void by the Bills of Sale Acts quoad the demise, and, therefore, following Daubuz v. Lavington, 13 Q. B. D. 347, that the mortgagee might indorse his writ under Order III. rule 6, and recover possession under Order

XIV., as "against a tenant whose term had expired or had been duly determined by notice to quit."

In Hampson v. Fellows, L. R. 6 Eq. 575, the mortgagor assigned the lease for twonty-one years of a house in which he resided, together with two policies of assurance on his life, to secure the repayment of 250l. and interest, and the premiums on the policies. By the deed the mortgagor attorned tenant to the mortgagee at the yearly rent of 175l., with a proviso for the determination of the tenancy at the will of the mortgagee. Malins, V.-C., restrained by injunction a distress under this clause for the principal, holding, however, that the mortgagee would have been justified in distraining under it for any "outgoings under the deed," that is to say, interest on the advance, premiums on the policies, and the landlord's rent of the house; the ground on which the Vice-Chancellor came to the conclusion that such was the intention of the clause, having apparently been, that the 175l. was, in round numbers, the aggregate amount of those outgoings.

This case, however, was not followed in Ex parte Harrison, 18 Ch. D. 127. The attornment clause there provided for a yearly rent of 593l. 15s., which was equal to the annual interest at $4\frac{3}{4}$ per cent. primarily covenanted for, though such interest was reducible to the rate of $3\frac{3}{4}$ per cent. on punctual payment. In the Court of Appeal, notwithstanding those circumstances, it was held that the fruits of a distress under the clause were properly applicable to principal as well as interest.

Another mode of securing the mortgagor's possession of the mortgaged premises is to make him tenant of them to a third person appointed by him and the mortgagee to receive the rents of the premises. This was done in Jolly v. Arbuthnot, 4 De G. & J. 224. In that case, by a deed, executed at the same time as the mortgage, and made between the mortgagor, mortgagee, and Aplin, after reciting that it was agreed that, for the purpose of securing payment of the interest, and providing a fund for repayment of the principal, the mortgagor should attorn as tenant to Aplin, it was witnessed that the mortgagor and mortgagee in pursuance of the agreement constituted Aplin receiver of the rents and profits of the premises, with powers of entry and distress, and that the mortgagor attorned to Aplin and became his tenant from year to year; provided that, on default in payment, the mortgagee might enter and avoid the tenancy created by the attornment, and that nothing contained in the deed should abridge his rights or powers under the mortgage. After execution of this deed, and after default in payment on the appointed day of the principal sum secured by the mortgage, the mortgagor was adjudicated a bankrupt, and thereupon Aplin distrained on his goods on the premises for a year's rent. The chief question was, which of the two parties - the mortgagee, or the assignees in bankruptcy of the mortgagor was entitled to the proceeds of this distress.

The M. R. decided in favour of the assignees, holding that the relation of landlord and tenant did not exist between the bankrupt and the receiver, for, as the receivership deed recited the true state of the title, it could not by estoppel constitute that relation, and that consequently no estate was conferred on Aplin to which the right of distress could be annexed so as to be available against the assignee of the mortgagor. It seems, however, that his Honour, in referring to *Dancer v. Hastings*, 4 Bing. 34, (in which a demise by a receiver appointed by the Court of Chancery was determined to be a good lease to entitle him to distrain and to estop the tenant from denying the tenancy,) did not notice the report of that case in 12 B. Moore, 2, which

report shows that there the lease, setting out the title of the lessor as receiver appointed by the court, disclosed the fact that he had no interest in the land.

Against this decision of the M. R. the mortgagee appealed, and the appeal was allowed by Lord Chelmsford, C. The judgment on appeal contains a learned review of the authorities upon the subject. The Lord Chancellor held that the circumstance of the truth of the case appearing on the deed, was a reason why the agreement of the parties should be carried out, either by giving effect to their intentions in the manner prescribed, or by way of estoppel to prevent their denying the right to do the acts which they had authorised to be done; and that even if the creation of the tenancy did not admit the scintilla of a reversion to which the right of distress might be annexed, yet there was nothing in such cases to prevent the power from being exercised, although there might be no reversion in the person to whom the attornment was made; that the relation of landlord and tenant was in fact created by the intention of the parties, and that consequently the power of distress was not a mere power in gross but might be exercised against the assignee. See also Evans v. Mathias, 7 E. & B. 590. In Morton v. Woods, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81, the Court of Exchequer Chamber expressly followed the above decision of Lord Chelmsford, C., and the lastmentioned case was followed by the C. A. in Ex parte Punnett, 16 Ch. D. 226, 50 L. J. Ch. 212.

With respect to the nature of the mortgagor's possession after the mortgage, where there is no stipulation that he should be allowed to remain in possession for any certain time, there seems to be more difficulty. Messrs. Coote and Morley, in an elaborate note to Watkins on Conveyancing, deliver it as their opinion, that "if there be no express agreement originally as to the period of possession, and the mortgagor, being the occupant, remain in possession with the consent of the mortgagee, it seems that, in such a case, he ought to be considered strictly as tenant at will."

This is true, if it be admitted that he has remained in possession with the consent of the mortgagee. But the more difficult question seems to be under what circumstances shall the mortgagee's consent be taken to exist, and shall it be implied merely from the fact of his abstaining from ousting the mortgagor immediately after the execution of the mortgage? Certain'y neither the case of Thunder dem. Weaver v. Belcher, 3 East, 450; nor that of Smartle v. Williams, 1 Salk. 246; 3 Lev. 387, which are cited by Messrs. Coote and Morley, have any tendency in favour of such an implication; for, in the former, ejectment was brought against a tenant let into possession by the mortgagor after the mortgage; and, as there had been no recognition of him by the mortgagee, there was judgment against him; and so far was the court from considering that the mortgagor would, under the circumstances above supposed, have been tenant at will, had he remained himself in possession instead of letting, that Lord Ellenborough says, "a mortgagor is no more than a tenant at sufferance, not entitled to any notice to quit; and one tenant at sufferance cannot make another."

In Smartle v. Williams the mortgagor certainly remained in possession, and that with the express consent of the mortgage, for Holt, C. J., says: "Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will." But in that case the mortgagee had assigned the mortgage; and the question was, whether, by doing so, he had determined his will, and whether the mortgagor's subsequent continuance in possession divested the estate of the assignee, and turned it to a

right so as to prevent a person to whom the assignee afterwards assigned, and who brought the ejectment, from taking any legal interest; upon which point the court held that it had no such effect, since the mortgagor was, at all events, tenant at sufferance after the assignment.

And it is not believed that there exists any decision in which a mortgagor remaining in possession, after an absolute conveyance away of his estate, by way of mortgage, without any consent on the part of the mortgagee, express or to be implied otherwise than from his silence, has been considered in any other light than as tenant at sufferance, to the definition of whom he seems strictly to answer, being a person who comes in by right, and holds over without right: see Co. Litt. 57, and Lord Hale's MSS., note 5, where the following case is put, which seems analogous:—"if tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election."

This subject has been treated at some length, because the reader will find it often said that a mortgagor in possession is tenant at will quodammodo; an idea which Lord Mansfeld especially seems to have countenanced, for in the principal case he says, "when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will, in the strictest sense: and therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt:" and in Moss v. Gallimore, which will be printed in this collection, he calls the mortgagor "tenant at will quodammodo." Whereas Lord Ellenborough, in Thunder v. Belcher, denominated him "tenant at sufferance;" and it is submitted that it would be more convenient to range his possession under some one of the ancient and well-known descriptions of tenancy than to invent the new and anomalous class of tenants at will quodammodo, for the only purpose of including it. See Litt. sec. 381.

["A mortgagor is not in all respects a mere bailiff, he is much like a bailiff; he is not a mere tenant at will; in fact, he can be described merely by saying he is a mortgagor." Per Parke, B., Litchfield v. Ready, 20 L. J. Exch. 51. "He is not a tenant at all," per Patteson, J., Wilton v. Dunn, 17 Q. B. 299, and Watson, B., Hickman v. Machin, 4 H. & N. 722. "The case of Keech v. Hall established the doctrine that (in the absence of any contract or conduct to vary the application of the law) a mortgagee having the legal estate may, without any notice to quit, treat the tenant or lessee of the mortgagor as a trespasser or wrong-doer; and that the possession held by the mortgagor, or those holding under him until the mortgagee thinks fit to take it, is in the strictest sense precarious, and held at the mere will of the mortgagee," per Lord Selborne, Lows v. Telford, 1 App. Cas. 426; 45 L. J. Ex. 613; and see the judgment in Jolly v. Arbuthnot, 4 De.G. & J. 224; Powell v. Allen, 4 Kay & J. 343; Thorp v. Facey, 35 L. J. C. P. 349; Ex parte Isherwood, 22 Ch. D. 391, per Jessel, M. R.

In Gibbs v. Cruickshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, the Court seem to adopt the view that the mortgagor is a tenant at sufferance, but that at any rate he cannot create a sub-tenancy; his sub-tenants are mere tort feasors and cannot sue the mortgagee in trespass.]

Upon the whole it is concluded, 1st. That, if there be in the mortgage-deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the meanwhile termor of the intervening term. 2dly. That if default be made on that day, he becomes tenant at sufferance. 3dly. That when there is no such agreement, he is tenant at suffer-

ance immediately upon the execution of the mortgage, unless the mortgagee expressly or impliedly consented to his remaining in possession. 4thly. That such consent renders him tenant at will. 5thly. That if in any of the last three cases he let in tenants, they may [in cases not falling within the Conveyancing Act, 1881, s. 18] be treated by the mortgagee, if he think proper, as tort feasors. 6thly. That, if the mortgagee recognise their possession, they become his tenants. Lastly, that the mere receipt of interest from the mortgagor does not amount to such a recognition. These two last propositions must, however, now be taken subject to the doubts expressed in Ecans v. Elliot.

[By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, subs. 5, it is provided that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."]

The relation between mortgager and mortgager with reference more especially to proceedings for the recovery of rents from the tenants of the land, is further considered in the note to Moss v. Gallimore, post.

Relation of a mortgagee to a tenant under a lease made by a mortgagor subsequently to the mortgage and while remaining in possession of the mortgaged premises. - (As to the tenant's position with reference to the payment of rent, see American notes to Moss v. Gallimore, infra.) The mortgagor cannot make a lease which will be binding upon the mortgagee; McDermott v. Burke, 16 Cal. 580; Clary v. Owen, 15 Gray 522. The mortgagee, in the absence of statute, is entitled to the immediate possession of the mortgaged premises; Colman v. Packard, 16 Mass. 39; Doe v. Grimes, 7 Blackf. (Ind.) 1; may enter without notice to the mortgagor; Holbrook v. Lackey, 11 Met. 458; Blaney v. Bearce, 2 Greenl. 132; Hartshorn v. Hubbard, 2 N. H. 453; Brown v. Cram, 1 ib. 169; and such an entry will authorise the retaining of possession and the taking of the rents and profits; Welch v. Adams, 1 Met. 494; Reed v. Davis, 4 Pick. 215.

Trespass.— The mortgagee must enter before he can maintain trespass q. cl. against the mortgagor or his tenant; Mayo v. Fletcher, 14 Pick. 525, 532; Furbush v. Goodwin, 29 N. H. 321; Wheeler v. Montefiore, 2 Q. B. 133; Litchfield v. Ready, 5 Ex. 939, 945; otherwise, though, if the injury be to the free-

hold; Leavitt v. Eastman, 77 Me. 117; Cole v. Stewart, 11 Cush. 181; Page v. Robinson, 10 ib. 99; Furbush v. Goodwin, supra.

Ejectment. — The mortgagee may maintain an action of ejectment against the tenant without notice, to quit; Doe v. Mace, 7 Blackf. (Ind.) 2; Den v. Stockton, 7 Hals. (N. J.) 322; New Haven Bank v. McPartlan, 40 Conn. 90; Carroll v. Ballance, 26 Ill. 9; Rogers v. Humphreys, 4 Ad. & E. 299 at 313; Thunder d. Weaver v. Belcher, 3 East 449; or the mortgagee may eject the tenant without notice to quit; Corner v. Sheehan, 74 Ala. 452; Bank of Wash. v. Hupp, 10 Grattan 23 at 49; Bartlett v. Hitchcock, 10 Bradw. (Ill.) 87; Stedman v. Gassett, 18 Vt. 346; Downard v. Groff, 40 Iowa 597; Brown v. Cram, 1 N. H. 169. For the doctrine peculiar to New York, see Lane v. King, 8 Wend. 584; M'Kircher v. Hawley, 16 Johns. 289; and the tenant, when ejected, cannot retain the emblements; Lynde v. Rowe, 12 Allen 101; Mayo v. Fletcher, 14 Pick. 525; Jones v. Thomas, 8 Blackf. (Ind.) 428; Downard v. Groff, supra; Lane v. King, supra. If the mortgagee enter, neither the mortgagor nor his tenant will be entitled to the emblements; Clary v. Owen, 15 Gray 522, 525.

Crops and Improvements.—The purchaser at a foreclosure sale is entitled to the crops growing at the time of sale; Shepard v. Philbrick, 2 Den. (N. Y.) 174; not only as against the mortgagor, but all persons claiming under him; Rankin v. Kinsey, 7 Bradw. (Ill.) 215, 219; and may maintain trespass against the mortgagor or his tenant for taking and carrying them away; Downard v. Groff, supra; or replevin, Scriven v. Moote, 36 Mich. 64; or he may proceed by injunction to restrain the mortgagor's creditor from levying upon the growing crops; Crews v. Pendleton, 1 Leigh (Va.) 297. That the tenant, when the mortgagee has recovered possession of the mortgaged premises, cannot be allowed compensation for improvements; see Haven v. Boston & Worcester Corp., 8 Allen 369; Haven v. Adams, 8 ib. 363.

Action for mesne profits by the mortgagee against the tenant.— Whether the entry of the mortgagee into the mortgaged premises, (it being unimportant whether the entry was made with or without action,) relates back so as to allow the mortgagee to recover in an appropriate form of action the mesne profits accruing prior to the entry, is a question not free from doubt.

The prevailing doctrine in this country is that held in Massachusetts and New Jersey, probably, but in Virginia see Bank of Wash. v. Hupp, 10 Grattan 23 at 49. In Mass., Mayo v. Fletcher, 14 Pick. 525, 531, it was said that mesne profits accruing prior to the entry by the mortgagee could not be recovered, because the tenant was entitled to the rents and profits so long as he was allowed to remain in possession of the mortgaged premises. In New Jersey, the majority of the court held in Sanderson v. Price, 1 Zab. 637, that the tenant would be liable to the mortgagee for mesne profits only from actual entry, although four dissenting judges, following the Vermont cases, Lyman v. Mower, 6 Vt. 345 and cases there cited, held that after actual entry by the mortgagee the tenant would be liable from the time of actual notice from the mortgagee and, in the absence of other notice, from the time of the service of the process in the ejectment proceeding; see, also, Henshaw v. Wells, 9 Humph. (Tenn.) 568, 582. In England, it is held that after actual entry, whether, by action or not, the entry relates back so that the mortgagee may recover the mesne profits if he proves his title to possession at the time they were taken; Barnett v. Guilford, 11 Ex. 19, 31. In England, therefore, although the mortgagee cannot by mere notice compel the tenant to pay him the rents then due, as rents, yet he may be able in an action for mesne profits to recover the equivalent for the rents. As to the form of action for mesne profits, it has been held, Goodtitle v. North, Douglas 584, that mesne profits, prior to the day of the demise laid in the declaration in ejectment, may be recovered in an action for use and occupation, if the plaintiff waives the tort, but that use and occupation will not lie for mesne profits accruing subsequently to that day, as the plaintiff, having in the ejectment proceeding treated the defendant as a trespasser, is estopped from treating him as a tenant, Birch v. Wright, 1 T. R. 378, 87. After the mortgagee has entered, he may recover mesne profits from that time from the tenant in possession refusing to yield the possession, Northampton Mills v. Ames, 8 Met. 1; Hill v. Jordan, 30 Me. 367, even though the entry be ineffectual for the purpose of foreclosure, Northampton Mills v. Ames, supra.

Writ of entry. — That a mortgagee, never having entered, may, without notice to the mortgagor to quit, maintain a writ of entry against him; see Mayo v. Fletcher, 14 Pick. 525, 530;

Blaney v. Bearce, 2 Greenl. 132, 7; Hobart v. Sanborn, 13 N. H. 221; Hartshorn v. Hubbard, 2 ib. 453; and as the tenant stands in the place of the mortgager with the same rights and liabilities, the mortgagee without having entered can without notice undoubtedly maintain a writ of entry against the tenant. If, after the mortgagee has entered, his possession is disturbed by the mortgager or his tenant, the mortgagee can maintain a writ of entry, and recover damages for the rents and profits of which he has been wrongfully deprived: Stewart v. Davis, 63 Me. 539; Miner v. Stevens, 1 Cush. (Mass.) 468.

WIGGLESWORTH v. DALLISON.

TRINITY. - 19 GEO. 3.

[REPORTED DOUGL. 201.]

A custom that the tenant, whether by parol or deed, shall have the way-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds (a).

This was an action of trespass for moving, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded liberum tenementum, and the other defendant justified as his servant. The plaintiff replied, that true it was that the locus in quo was the close, soil, and freehold of Dallison; but, after stating that one Isabella Dallison, deceased, being tenant for life, and Dallison, the reversioner in fee, made a lease on the 2nd of March, 1753, by which the said Isabella demised, and the said Dallison confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for twentyone years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession till the end of the said term of twenty-one years — he pleaded a custom in the following words, viz., "That within the parish of Hibaldstow, there now is, and, from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath ex-

⁽a) And where entitled by custom to the way-going crop, he keeping the fences in repair, the possession

remains in the tenant. See Griffiths v. Puleston, 13 M. & W. 359.

pired on the first day of May in any year, hath been used and accustomed, and of right ought, to have, take, and enjoy, to his own use, and to reap, cut, and earry away, when ripe and fit to be reaped and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the country. The cause was tried before Eyre, Baron, at the last assizes for Lincolnshire, when the jury found the custom in the words of the replication.

Baldwin moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of cases by deed. He relied on Trumper v. Carwardine, before Yates, Justice (a), the circumstances of which case were these:

"The plaintiff had been lessee under the corporation of *Hereford* for a term of twenty-one years, which expired on the 4th of December, 1767. In the lease there was no covenant that the tenant should have his off-going crop. In the seed-time, before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat when it became ripe, and cut and housed it himself, for his own

⁽a) At the summer assizes for Herefordshire, 1769.

use. Upon this the plaintiff brought an action on the case, and declared on a custom in *Herefordshire* for tenants to quit their farms at Christmas or Candlemas to reap the corn sown the preceding autumn. *Yates*, Justice, held the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parol agreements. That, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c.; and, therefore, all implication is taken away. That, if such a custom should be set up, the Statute of Frauds would be thereby superseded in *Herefordshire* (a). Accordingly the plaintiff did not recover on the custom, although on another count in trover, in the same declaration, he had a verdict."

A rule to show cause was granted.

The case was argued on Tuesday, the 8th of June, by Hill, Serjeant, Chambre and Dayrell, for the plaintiff, and Cust, Baldwin, Balguy, and Gough, for the defendants; when three objections were made on the part of the defendants, viz.; 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, as had been contended on moving for the rule, it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was argued. 1. That it was not an unreasonable custom, because, without an express agreement, or such a custom as this, there could be no crop the last year of a term, but the tenant would not sow if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public as much as customs for turning a plough or drying nets, on another person's land, which had been held to be good (b). That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one; not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently certain, by the reference to the residue

⁽a) Qu. This argument seems more applicable to parol leases, because, if a parol lease for three years could be extended in some degree for half a year longer by

such a custom, it might be said that this would be repugnant to the Statute of Frauds.

⁽b) Vide Davis, 32 b.

of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of; for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. Reasonable is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, &c. In the case of Bennington v. Taylor, reported in Lutwyche (a), where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstance of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed. that the defendant would depart from the custom, although the parties must have known of it when the lease was execated. He did not claim under any parol contract express or implied; and, therefore, the argument of repugnancy did not apply; and the Nisi Prius case which had been cited, went upon mistaken reasoning. Hill, Serjeant, admitted that he knew of no instance in the Reports, of a similar custom to this. in the case of freehold property; but he said that there were several with regard to copyholds that went much farther; and he cited Eastcourt v. Weekes (b), where a custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over till the Michaelmas following, is stated on the pleadings (c); and no objection taken to it on the argument of the case.

⁽a) C. B., E. or T. 12 W. 3; 2 Lutw. 1517, 1519.

⁽c) It is found by the special verdict, the action being ejectment.

⁽b) T. 10 W. 3; 1 Lutw. 799, 801.

For the defendant were cited, Grantham v. Hawly (a); White v. Sawyer (b), in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral (c). A case relied on by Houghton, Justice, in White v. Sayer (d), in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law; Startup v. Dodderidge (e), where the court refused to grant a prohibition, on the suggestion of a modus "to pay, upon request, at the rate of two shillings for every pound of the improved yearly rent or value of the land," because the yearly rent or value was variable and uncertain: Nailor, qui tam v. Scott (f), where a custom having been found by a jury, "that every housekeeper in the parish of Wakefield having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being, 1. Uncertain, because the usual time for women to be churched was not alleged (q). 2. Unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died before the time of churching: Carleton v. Brightwell (h), where the defendant, on a bill of tithes, set up a modus that "the inhabitants of such a tenement, with the land usually enjoyed therewith, should pay such a sum for tithe corn," and

(a) T. 13 Jac.; 1 Hob. 132. That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, viz., that the question was brought on in an action of debt on a common bond conditioned for the payment of 201 to the plaintiff if a certain crop of corn did of right belong to him; or, in other words, if the question of law was in his fayour.

- (b) B. R. M. 19 Jac. 1 Palm. 211.
- (c) Cites 21 H. 7, 14.
- (d) B. R. M. 19 Jac. 1 Palm. 211.
- (e) E. 4 Ann.; 2 Ld. Raym. 1158; 2 Salk. 657; 1 Mod. 60.
 - (f) E. 2. G. 2; 2 Ld. Raym. 1258.
- (g) In that case the custom, as suggested, did not refer to the usage of the parish.
 - (h) Canc. T. 1728; 2 P. W. 462.

it was held by the Master of the rolls to be void for uncertainty; Harrison v. Sharp (a), where a modus that, "when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas yearly," was held void, on the authority of Startup v. Dodderidge; Wilkes v. Broadbent (b), where the Court of Common Pleas, and afterwards, on error brought the Court of King's Bench, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use of the pits, and to take coals so laid, away in carts, and to burn and make into cinders coals laid there, at their pleasure," to be void, because, among other reasons, the word near was too vague and uncertain; Oland v. Burdwick (c), where a feme copyholder durante viduitate, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that when the interest in land is determined by the act of the party, he shall not have the crop: an anonymous case in Moore (d), where it was held, that a custom "that lessee for years should hold for half a year over his term," was bad; Roe, lessee of Bree v. Lees (e), where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were inclosed, and nine lay in certain open fields, a special case was reserved, which stated a custom, "that when a tenant took a farm, in which there was any open field, more or less for an uncertain term, it was considered as a holding from three years to three years;" and though the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100

⁽a) T. 1724; Bunb. 174.

⁽d) H. 3 Ed. 6; Moore 8, pl. 27.

⁽b) B. R. E. 18 G. 2, 2 Str. 1224.

⁽e) C. B. M. 18 G. 4. Since re-

⁽c) B. R. H. 37 El. Cro. Eliz. 460; ported in 2 Blackst. 1171. 5 Co. 116.

acres of land inclosed. Besides the above authorities (a), the case before Yates, Justice, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parole demise, may be raised by implication; as where saffron is cultivated, in Cambridgeshire; liquorice, near Pontefract; or tobacco, which formerly used to be planted in *Lincolnshire*; but it was contended, that, in such cases, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument. Such a custom as that set up, in the present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as, in the time of Richard I., and long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the 1st of May, old style, and this lease was made and commenced after the alteration was introduced by 24 Geo. 2, c. 23 (b).

The Court took time to consider; and this day, Lord Mansfield delivered their opinion as follows:

Lord Mansfield. — We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap (c). But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement

⁽a) 4 Co. 51 b; 1 Roll. Abr. 563, pl. 9, et Co. Litt. 55, were also cited for the general principles concerning customs and emblements.

⁽b) The new style commenced the 1st of January, 1753. But if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part

of it, as from the errors in the former method of computation the nominal day was continually deviating, by degrees, from the natural day.

⁽c) [See 14 & 15 Vict. c. 25, s. 1, giving the tenant in lieu of emblements a right to occupy until the end of the current year of his tenancy.]

in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease (a).

The rule discharged (b).

Few questions are of more frequent practical occurrence than those which involve the admissibility of parol evidence of custom and usage for the purpose of annexing incidents to, or explaining the meaning of, written contracts. In one of the later cases on the subject, the following luminous account of this head of the law was given by Parke, B., delivering the judgment of the Court of Exchequer. 1 M. & W. 474.

"It has long been settled," (said his lordship,) "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favourably

- (a) Vide Doe v. Snowden, C. B. M. 19 Geo. 3, 2 Black. 1225, where it is said by the court, that if there is a taking from Old Lady-day (5th April), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2nd of February), to prepare for the Lent corn, without any special words for that purpose, i.e. in a written agreement for seven years; for the court were speaking of such an agreement.
- (b) Judgment was accordinly entered for the plaintiff, upon which a writ of error was brought in the Exchequer Chamber, and the defendant assigned for errors, "that the custom

contained and set forth, &c., is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." The case was argued at Serjeants' Inn, before the Judges of C. B., and the Barons of the Exchequer, by Balguy, for the plaintiff in error, and Chambre for the defendant. The objection to the reasonableness of the custom was abandoned. In T. 21 G., (27th June, 1781,) Lord Loughborough delivered the unanimous opinion of the Court of Exchequer Chamber, that the custom was good, and the judgment was affirmed.

inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

"Accordingly, in Wigglesworth v. Dallison, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the Court of King's Bench in Senior v. Armitage, reported in Mr. Holt's Nisi Prius Cases, p. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenantright, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, 'unless the agreement in express terms excluded it; ' and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

"On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

"The next reported case on this subject is Webb v. Plummer, 2 B. & A. 746, in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground); but the court held, as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

"The question then is, whether from the terms of the lease now under consideration, it can be collected that the parties meant to exclude customary allowance for seed and labour."

In the case from which the above is extracted, viz., Hutton v. Warren, 1 M. & W. 466, a custom by which the tenant, cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable allowance in respect of seed and labour bestowed on the arable land in the last

year of his tenancy, and was bound to leave the manure for the landlord, if he would purchase it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

From the above luminous judgment of Baron Parke it may be collected, that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent.

1st. In contracts between landlord and tenant.

2nd. In commercial contracts.

3rd. In contracts in other transactions of life, in which known usages have been established and prevailed.

But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced,—

1st. By the express terms of the written instrument.

2nd. By implication therefrom. [See the above rules cited with approval by Blackburn, J., in *Myers* v. *Sarl*, 3 E. & E. 306.]

With respect to the first class of cases in which the evidence has been received, viz., that of contracts between landlord and tenant, that is so thoroughly discussed in Hutton v. Warren, part of the judgment in which is above set out, and in Wigglesworth v. Dallison, the principal case, that it seems unnecessary to say more on that head of the subject. See Holding v. Pigott, 7 Bing. 465; Roberts v. Barker, 1 C. & M. 803; Hughes v. Gordon, 1 Bligh. 287; Clinam v. Cooke, 2 Sch. & Lef. 22; White v. Sayer, Palm. 211; Furley v. Wood, 1 Esp. 198; Doe v. Benson, 4 B. & A. 588. Where there is a custom to pay for fallows, &c., and no incoming tenant, there is an implied contract on the part of the landlord to pay according to the custom, Faviell v. Gaskoin, 7 Exch. 273. [In Muncey v. Dennis, 1 H. & N. 216, a custom of the country binding the incoming tenant to pay the outgoing tenant for straw left on the farm, was held not to be excluded by a provision in the lease to the outgoing tenant that all straw should during the term be consumed, and the manure used, on the premises. In Tucker v. Linger, 8 App. Cas. 508; 52 L. J. Ch. 941, a custom for a tenant to sell flints turned up on the surface of the land and removed in the course of good husbandry, was held a reasonable custom, and one not inconsistent with the terms of the lease, which provided that "the lessor reserved, inter alia, all mines and minerals, sand, quarries of stone, brick-earth, and gravel-pits, with liberty to enter to dig, take, convert, and carry away the same, doing no unnecessary damage." A custom not of the country, but prevalent between the owner and tenants of a particular landed estate, is not binding on a tenant who becomes such without notice of its existence: Womersley v. Dally, 26 L. J. Exch. 219. the evidence of contract between the outgoing and incoming tenant to pay for tillages at a valuation, and the right of the latter to pay the amount of such valuation to the landlord for rent due from the outgoing tenant, see Stafford v. Gardner, L. R. 7 C. P. 242. A custom making the incoming tenant alone liable to the outgoing tenant, and exempting the landlord from liability, though proved to exist in fact, was held bad in law as unreasonable. burn v. Foley, 3 C. P. D. 129, 47 L. J. C. P. 331. That a six months' notice to quit must by custom be from feast day to feast day irrespective of the number of days intervening, see Morgan v. Davies, 3 C. P. D. 260.]

With respect to contracts commercial, it has been long established that evidence of a usage of trade applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent.

[An objection has been raised that to admit evidence of a usage in the case of a contract required by the 17th section of the Statute of Frauds to be in writing would be to contravene that statute by introducing into the contract a term not included in the written memorandum of it. But the point was disposed of in *Humfrey* v. *Dale*, E. B. & E. 1004, and see *Wilson* v. *Hart*, 7 Taunt. 295.

It was laid down in former editions of these notes that] the words "usage of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence in pais, and the knowledge of which resides in the breasts of the judges. See Vallejo v. Wheeler, Loft. 631; Edie v. E. I. Company, 1 Wm. Black, 299, 2 Burr. 1216; [Brandao v. Barnett, 3 C. B. 519, 530; Suse v. Pompe, 8 C. B. N. S. 538; Crouch v. Crédit Foncier, L. R. 8 C. P. 374, 42 L. J. Q. B. 183;] sed vide Haille v. Smith, 1 B. & P. 563, in which evidence of the general custom of merchants was received; [and the remarks of Cockburn, C. J., in delivering the judgment of the Exchequer Chamber in Goodwin v. Roburts, L. R. 10 Ex. at pp. 346, 356, 44 L. J. Ex. 57, 157.]

This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now: thus we find Buller, Justice, saying, 2 T. R. p. 73, that "within the last thirty years (his lordship spoke in 1787) the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future." [The subject was, however, after full consideration, thus dealt with by Cockburn, C. J., in delivering the judgment of the Court of Exchequer Chamber in Goodwin v. Robarts, L. R. 10 Ex. at p. 346, 44 L. J. Ex. 162. "It is true," says his lordship, "that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But, as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage

prevailing generally in the particular department. By this process what before was usage, only unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it." On appeal, the last cited judgment was affirmed in the House of Lords, I App. Cas. 476, though the meaning of the phrase, the "law merchant," was not specially adverted to in the opinions then delivered by the noble lords. It must not be taken that when a usage has once been proved as a matter of fact, it is to be in all subsequent cases judicially noticed as a matter of law. See Southwell v. Bowditch, in C. A. 1 C. P. D. 374, 45 L. J. C. P. 374, 630; "but," says Lord Justice Mellish, in Ex parte Powell, 1 Ch. D. 506, "there is no doubt that a mercantile custom may be so frequently proved in courts of common law, that the courts will take judicial notice of it, and it becomes part of the law merchant." And accordingly in Crawcour v. Salter, 18 Ch. D. 53, and Ex parte Turquand, 14 Q. B. D. 636, 54 L. J. Q. B. 242, the C. A. took judicial notice of the custom of hotel keepers to hire furniture so as to exclude the operation of the reputed ownership clause in the Bankruptcy Act. And see also the observations of Brett, L. J., Lohre v. Aitchison, 3 Q. B. D., at p. 562, as to the meaning attached by often proved custom to various clauses in a Lloyd's policy. At what period or by what process the transformation takes place it is not easy precisely to determine. In Alexander v. Vanderzee, L. R. 7 C. P. 530, followed in Ashford v. Redford, L. R. 9 C. P. 20, 43 L. J. C. P. 57, a question was left to the jury as to the mercantile meaning of "For shipment in June and (or) July" apart from any usage. See the former case commented upon in Bowes v. Shand, 2 App. Cas. 455, 46 L. J. Q. B. (H. L.) 561. See also Birch v. Depeyster, 4 Camp. 385.]

With regard to particular *commercial usages*, evidence of them is admissible either to ingraft terms into the contract, or to explain its terms.

[In the first of these two classes come the] cases concerning the time for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship, Noble v. Kennaway, Dougl. 510, and see the observations on this case in Ougier v. Jennings, 1 Camp. 503, n.; Moon v. Guardians of Witney Union, 3 Binn. N. C. 817. See further Bottomley v. Forbes, 5 Bing. N. C. 123; Vallance v. Dewar, 1 Camp. 403, et notas; Cochran v. Retbury, 3 Esp. 121; Birch v. Depeyster, 1 Stark. 210; 4 Camp. 385; Donaldson v. Forster, Abb. on Shipp. part 3, cap. 1; Baker v. Payne, 1 Ves. jun. 459; Raitt v. Mitchell, 4 Camp. 146; Lethulier's Case, 2 Salk. 443; Bowman v. Horsey, 2 M. & Rob. 85; [Allan v. Sundius, 1 H. & C. 123.

And as to evidence of a usage not to pay general average on deck cargo, see Miller v. Titherington, 6 H. & N. 278; nor for damage caused by water used to extinguish a fire, Stewart v. West India and Pacific Steamship Co., L. R. 8 Q. B. 88, 362, a usage which since this decision has, it is believed, ceased to obtain; to pay freight according to the measurement at the port of loading: Buckle v. Knoop, L. R. 2 Ex. 125, 36 L. J. Ex. 49; for general steamships unloading in the London Docks to unload their cargoes on the quay: Marzetti v. Smith, 1 Cab. & El. 6. See also as to the various rules which have been imported into the contract by a policy of marine insurance, Lohre v. Aitchison, 3 Q. B. D. 558; Knight v. Cotesworth, 1 Cab. & El. 48.]

In Brown v. Byrne, 3 E. & B. 703, a case very elaborately argued at the bar, a bill of lading which made the goods deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny per pound, with 5 per cent primage and average accustomed," was held not to exclude the operation of a custom in the trade at Liverpool, by which three

months' discount was deducted from bill of lading freights of goods coming from, amongst others, the port of shipment. In the marginal note, the court are said to have held that this custom controlled the bill of lading; perhaps it would be better to have said that 't was not inconsistent with it. [See per Lord Campbell in Hall v. Janson, 4 E. & B. 510; and Cathbert v. Camming, 10 Exch. 809; affirmed in 11 Exch. 405. See also Falkner v. Earle, 32 L. J. Q. B. 124, where Brown v. Byrne was followed.

Evidence has been held admissible of a custom in the iron trade that a manufacturer contracting to supply iron plates must supply them of his own manufacture: see *Johnson v. Raylton*, 7 Q. B. D. 438, 50 L. J. Q. B. 753.

In Merchant Banking Co. v. Pharnix Bessimer Steel Co., 5 Ch. D. 205, 46 L. J. Ch. D. 418, a custom was upheld whereby, in the iron trade, where warrants were given stating on the face of them that they were deliverable to the purchasers or their assigns, by indorsement thereon, it was understood that they were to be free from any vendor's lien for unpaid purchase-money, that they passed from hand to hand by indorsement, and conveyed to the holder a title to the goods represented by them.

In Field v. Lelean, Exch. Cham. 6 H. & N. 617, 30 L. J. Exch. 168, evidence of a usage amongst brokers that on the sales of mining shares the seller is not bound to deliver without contemporaneous payment, was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought and sold notes payment of the price was to be made, half in two, half in four months, and nothing was there said as to the time of delivery. This case is a strong one, but it can be questioned in Dom. Proc. only. Upon the question whether it overrules Spartali v. Benecke, 10 C. B. 212, see the judgment of Williams, J., in Field v. Lelean. See also Godts v. Rose, 17 C. B. 229.]

And as to evidence of a usage to pay an agent, Hutch v. Carrington, 5 C. & P. 471; for a factor to sell in his own name, Johnstone v. Usborne, 11 A. & E. 449; [for a broker employed to buy to make himself personally responsible for the price, Cropper v. Cook, L. R. 3 C. P. 194; for a broker employed to purchase to become a seller in the transaction without the knowledge of his employer, Robinson v. Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362; or to buy without making a binding contract of purchase on his employer's behalf, Ib.; as to an introducing broker's rights to subsequent commissions, Allan v. Sundius, 1 H. & C. 123; Gibson v. Crick, Ib. 142. In Baines v. Ewing, L. R. 1 Ex. 329, 35 L. J. Ex. 194, it was held, that the presumption which would have arisen of an insurance broker's authority to underwrite generally for the defendant at Liverpool, was rebutted by the custom proved to exist at Liverpool, by which an assurance broker's authority to underwrite is always, or nearly always, limited to a certain sum. And, therefore, where the defendant's broker had taken a risk in excess of his authority, the defendant was held not liable as principal on the contract although the plaintiff, the assured, had not been aware that the broker had exceeded his limit.

In Humfrey v. Dale, 7 E. & B. 266, in error, E. B. & E. 1004, it should seem that not merely a term but a party, was on oral evidence of a custom added to a contract in writing. The action was against Dale, Morgan, & Co., brokers, for not accepting ten tons of oil alleged in the declaration to have been sold to them by the plaintiff, and it was held to be maintainable, first by the Q. B. and afterwards in C. S., Martin, B., Willes, J., and Channell, B., dissenting. These were the facts: The plaintiff had employed T. & M.,

brokers, to sell the oil for him, and one Schenk employed the defendants to buy it. The brokers met, and the sale was effected, but the only written documents which could be produced as evidence of it were, first, a sale note of the oil, signed by the defendants, which commenced thus, "Sold this day for Messrs. T. & M. to our principals," and ended with the signature, "Dale, Morgan, & Co., brokers," and "a quarter per cent. brokerage to D., M., & Co.;" secondly, a sale note signed by T. & M., "brokers," and which commenced thus: "Sold to Dale, Morgan, & Co., for account of Mr. Humfrey" (the plaintiff), and ended with the clause, "quarter per cent. brokerage to D., M., & Co., half to us." The first of these notes was sent by the defendants to T. & M., the second by T. & M. to the plaintiff. There was evidence of usage of the particular trade that whenever a broker buys or sells without disclosing his principal, he is himself personally liable to be looked to as buyer or seller, and that it was in accordance with the usual practice in such cases, that T. & M. had not sent the defendants a note of the contract. The defendants did not disclose their principal till an unreasonable time after the contract made, nor until after tender of the oil and after he had become insolvent.

The court of Q. B. held the evidence of usage to be admissible. They considered that by necessary implication the defendants had in the first note said that they had bought for their principals, and though they said they had sold for T. & M. the plaintiff had shown, as he might, that T. & M. were only his agents. The court then proceeded to say that "the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imported, namely, that this was a contract which the defendants made as brokers. The evidence indeed is based on this: the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal. But the plaintiff, by the evidence, seeks to show that according to the usage of the trade, and as those concerned in the trade understand the words used, they import something more; namely, that if the buying broker did not disclose the name of his principal it might become a contract with him if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it, as affecting the validity of the contract; for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed the name of his principal; if he did that, it remained a sale to the principal, assuming of course, the broker's authority to bind him."

The court admitted that in *one* sense the evidence varied the contract. "In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with the added incident, the two would seem to import different obligations and be different contracts. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and varying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them."

It is perhaps to be regretted that this judgment was not taken up to the House of Lords. But it has been constantly acted upon, and seems now to

be firmly established, though the usage must, in each case, be proved. Southwell v. Bowditch, 1 C. P. D. 374, 45 L. J. C. P. 374, 630.

Fleet v. Murton, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49, was a very similar case to Humfrey v. Dale. See also Imperial Bank v. London and St. Kath. Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, and Bacmeister v. Fenton, Levy and Co., 1 Cab. & El. 121.

That of *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482, 42 L. J. C. P. 260, seems a still stronger one. There the defendant, acting as agent for one Lyons with due authority to do so, effected a charter-party, which was expressed in the body of it to be made between the plaintiff who was a shipowner, and the defendant as "agent to merchants." The defendant signed "as agent to merchants." The court admitting that but for the custom the defendant would not have been personally liable on the charter, held on the authority of the two last cited cases that evidence was admissible of a usage to make him so liable if he did not disclose his principal's name within a reasonable time.

In Wildy v. Stephenson, 1 Cab. & El. 3, it was endeavoured to prove a custom on the London Stock Exchange that a broker was personally liable to his employer on a contract for the sale of shares where the name of the principal was not disclosed, but the jury were unable to agree as to the existence of such a custom.

A variety of questions have been raised of late years, giving rise to no small diversity of judicial opinion, as to how far members of the Stock Exchange can avail themselves of its usages to relieve themselves of liability upon contracts made there. In Grissell v. Bristowe, L. R. 4 C. P. 36, 38 L. J. C. P. 10, the Court of Exchequer Chamber, reversing the decision of the Court of Common Pleas, upheld a custom of the Stock Exchange whereby a stock jobber who had purchased shares from one of the public through a stock broker on the Stock Exchange, was relieved from liability to take the shares and indemnify the vendor against calls if he gave the name and address of a nominee able and willing to take the shares to whom they were to be transferred, and such nominee was not objected to within ten days after the name was given. A similar decision was given by a court of equity: Coles v. Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81. And the like was held to be the case where the names, though given bona fide by the jobber, were those merely of men of straw put forward to shield the real purchaser: Maxted v. Paine, No. 2, L. R. 6 Ex. 132, 40 L. J. Ex. 57, diss. Cleasby, B., and Lush, J. A contract, it would seem, then arises between the vendor and the nominee, by which the latter is bound to indemnify the former against calls in respect of the shares so sold: Bowring v. Shepherd, L. R. 6 Q. B. 309, 40 L. J. Q. B. 129; Nickalls v. Merry, L. R. 7 H. L. 530, 733, 45 L. J. Ch. 575: but see per Blackburn, J., in Maxted v. Paine, No. 2, ubi sup. It may be observed that both in Grissell v. Bristowe, and in Bowring v. Shepherd the transfers had in fact been accepted and the price of the shares had been paid by the transferees' brokers though the transfers were not executed by the transferees. vendor has also (at any rate in equity) a right to be indemnified by the real purchaser, who has through his broker supplied the man of straw to the jobber, and through him to the vendor as transferee. Castellan v. Hobson, L. R. 10 Eq. 47, 39 L. J. Ch. 490. The jobber, however, is not discharged by the custom where the name given is of one who has not authorised the use of it. Maxted v. Paine, No. 1, L. R. 4 Ex. 81, 38 L. J. Ex. 41; or is under disability to contract - as an infant, Nickalls v. Merry, ubi sup.

The second subdivision above-named of cases in which evidence of com-

mercial usages is receivable, is where it is admitted to explain the terms of a contract,] as was done in *Udhe* v. *Walters*, 3 Camp. 16, by showing that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic; and in *Hutchinson* v. *Bowker*, 5 M. & W. 535, where it was proved that *good* barley and *fine* barley signified in mercantile usage different things. See further *Robertson* v. *Clarke*, 1 Bing. 445; *Moxon* v. *Atkins*, 3 Camp. 200; *Cochran* v. *Retberg*, 3 Esp. 121; *Chaurand* v. *Angerstein*, Peake, 61; *Bold* v. *Rayner*, 1 M. & W. 446; *Powell* v. *Horton*, 2 Bing. N. C. 668.

And as to evidence, that "sold 18 pockets Kent hops at 100s." means in the hop trade 100s. per cwt., Spicer v. Cooper, 1 Q. B. 424; that "in turn to deliver," in a charter-party to Algiers means at a particular spot in the port for a particular purpose, Robertson v. Jackson, 2 C. B. 412; [(as to the term "to load in regular turn," see Hudson v. Clementson, 18 C. B. 213; Lawson v. Burness, 1 H. & C. 396; Leideman v. Schultze, 14 C. B. 38; King v. Hinde, 12 L. R. Ir. 113); of the meaning of "Liverpool" in a charter-party as a port of arrival, Norden Steam Co. v. Dempsey, 1 C. P. D. 654, 45 L. J. C. P. 764; of "no St. Lawrence" in a policy of insurance, Birrell v. Dryer, 9 App. Cas. 345; of "running days" in a charter-party, Neilsen v. Wait, 16 Q. B. D. 67; that "bale" in the Gambier trade means a compressed package, weighing on the average two cwt., Gorrisen v. Perrin, 2 C. B. N. S. 681; that oil is "wet" if it contains any water, however little, Warde v. Stewart, 1 C. B. N. S. 88;7 to show the meaning of the description "about" so many quarters in a delivery order, Moore v. Campbell, 10 Exch. 323; [and "about" so many barrels in a charter-party, Alcock v. Leuw & Co., 1 Cab. & El. 98]; to explain the sense in which the word "London" was employed, Mallan v. May, 13 M. & W. 511: [that a "full and complete" cargo of sugar and molasses means at Trinidad a cargo packed in the ordinary way there; Cuthbert v. Cumming, 10 Ex. 809, affirmed 11 Ex. 405; the meaning of "the next two months" in the iron trade, Bissell v. Beard, 28 L. T. N. S. 740.

A question has sometimes been raised as to how far it is necessary in order to affect a person with the usage of a trade or market that he should be actually cognisant of it.

It was said in a case before the judicial committee, Kirchner v. Venus, 12 Moore, P. C. 361, that when evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it, and that no such presumption can arise when one of the parties is ignorant of it. And that is adopted in the marginal note as the statement of a general rule of law. It should seem, however, that the proposition must be restrained to subject matters like that before the court, namely, the condition of the holder for value of a negotiable instrument showing upon the face of it a clear right of the ordinary and usual kind unaffected by the custom; and the subsequent part of the judgment dwelt upon the special circumstances as being important. In Kirchner v. Venus, the indorsees resident in Sydney, of bills of lading, made in Liverpool, for the carriage of goods from Liverpool by the ship "Countess of Elgin," to Sydney, were, in an action of trover by them against the master of the ship for having refused to deliver up the goods at Sydney unless paid freight, held not to be bound by an alleged custom in Liverpool, of which the plaintiffs were ignorant, that though by the terms of the bills the freight was payable in Liverpool at a certain time after sailing, still the ship-owner, if it was not paid, had a lien for it at the port of discharge. See some remarks on this case in *Buckle v. Knoop*, L. R. 2 Ex. 125, per Kelly, C. B.; and see *Hathesing v. Laing*, L. R. 17 Eq. 92, 43 L. J. Ch. 233, and *Norden Steam Co. v. Dempsey*, 1 C. P. D. 662; 45 L. J. C. P. 764, per Brett, J.]

In Sutton v. Tatham, 10 A. & E. 27, it was laid down that a person employing a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though the principal be himself ignorant of them. And in Bayliffe v. Butterworth, 1 Exch. 425, Sutton v. Tatham was expressly approved of by Parke, B., and Rolfe, B.; and Alderson, B., laid down the law generally, that "a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place." And Parke, B., distinguished the cases of Gabay v. Lloyd, 3 B. & C. 793, and Bartlett v. Pentland, 10 B. & C. 760, in which the usage of Lloyd's Coffee-house was held not to be binding on persons who were not shown to have been cognizant of, or to have assented to it, on the ground that in Baylife v. Butterworth, the question was as to the authority which the broker received. [See, however, as to this distinction per Williams, J., in Sweeting v. Pearce, 7 C. B. N. S. 482.

In the latter case, affirmed 9 C. B. N. S. 534, 30 L. J. C. P. 109, the principal was held not bound by a usage of Lloyd's of which he was ignorant, but principally on the ground that Lloyd's is a mere private place of business and not a general market so as to come within the above rule. See per Bovill, C. J., Grissell v. Bristowe, L. R. 3 C. P. 127. But the court seem to have gone also upon the ground that the usage sought to be established would, if not known to the principal, be an unreasonable one, (see the judgment of Bramwell, B., in Cam. Scacc.,) following in this respect the decision in Scott v. Irving, 1 B. & Ad. 612, that a usage which would have the effect of making the broker and not the underwriter the debtor of the assured for a loss on a policy of insurance, can only bind those who are acquainted with it. See also per Fry, J., Pearson v. Scott, 9 Ch. D. 198, 47 L. J. Ch. 725, where an alleged custom of the Stock Exchange was held bad, whereby it was contended that a broker employed by a solicitor whom he knew to be an agent could settle in account with such solicitor (otherwise than by payment) behind the back of the principal. As will be presently stated more fully a custom if unreasonable is not binding; and the knowledge of the person to be bound may be an important element in deciding whether a custom is reasonable or not. See per Bowen, L. J., in Perry v. Barnett, 15 Q. B. D. at p. 397.

In Robinson v. Mollett in Dom. Proc., L. R. 7 H. L. 836, 838, Lord Chelmsford, L. J., states the rule to be that "if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character." In that case his lordship "hesitated to say that the usage in question would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevailed. But the usage was of such a peculiar character, and so completely at variance with the relations between the parties, converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his

duty, that he thought no person who was ignorant of such an usage could be held to have agreed to submit to its condition, merely by employing the services of a broker to whom the usage was known to perform the ordinary and accustomed duties belonging to such employment."

Subject to the above qualification, and to the custom not being unreasonable or otherwise objectionable in point of law, the rule above cited and laid down in Sutton v. Tatham, and Bayliffe v. Butterworth, has been constantly adopted and followed. See Stewart v. Aberdein, 4 M. & W. 211; Taylor v. Stray, 2 C. B. N. S. 175; Stray v. Russell, 1 E. & E. 888, 29 L. J. Q. B. 115; Greaves v. Legge, 2 H. & N. 216; Lloyd v. Guibert, 35 L. J. Q. B. per curiam; Grissell v. Bristowe, L. R. 4 C. P. 36; 38 L. J. C. P. 10; Duncan v. Hill, L. R. 8 Ex. 242, 42 L. J. Ex. 179. In the latter case the plaintiffs, who were stock brokers on the London Stock Exchange, had been employed by the defendant, a non-member, to carry over certain stocks and shares from one settling day to a later one. In the interval between the two days the plaintiffs became defaulters, whereupon, according to the rules of the Stock Exchange, their transactions were closed, and their accounts, including that of the defendant, were made up at the prices current on that day, without any communication with the defendant. It was held, in the Cam. Scace., reversing the decision of the Court of Exchequer, that the defendant was not liable to indemnify the plaintiffs for the "difference" or loss caused by the closing of his account, which had been forced on by the rules of the Stock Exchange, inasmuch as this had been caused by the plaintiff's own default.]

In Stewart v. Cauty, 8 M. & W. 160, a rule of the Liverpool Stock Exchange was admitted in evidence between parties not members of it, upon a question what was a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers.

[To come to cases] not falling within the head of mercantile contracts, evidence has been received to show that by the custom of a particular district the words "1000 rabbits" meant 1200 rabbits, Smith v. Wilson, 3 B. & Ad. 728; and see Clayton v. Gregson, 5 A. & E. 302. So in Reg. v. Stoke-upon-Trent, 5 Q. B. 303, an agreement in writing "to serve B. from 11 Nov., 1815, to 11 Nov., 1817," at certain wages, "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," was considered capable of explanation by a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves. See Phillips v. Innes, 4 Cl. & Fin. 234. Also in Grant v. Maddox, 15 M. & W. 737, an agreement by the manager of a theatre to engage an actress for "three years, at a salary of 51., 61., and 71. per week in those years respectively," was explained by the usage of the theatrical profession to mean that the actress was to be paid only whilst the theatre was open for performance. [In Parker v. Ibbetson, 4 C. B. N. S. 346, a custom that the yearly hiring of a clerk is determinable by a month's notice at any time, was held not inconsistent with a provision in the agreement, that at the end of the year the employer, if satisfied with the amount of business done, would make an addition of 30l. to the stipulated salary. So, again, in Evans v. Pratt, 3 M. & G. 759; 4 Scott, N. R. 370, S. C., in a memorandum as to a race, the run described was "four miles across a country," and evidence was admitted to show that in sporting parlance the meaning of those words is straight across over all obstructions without liberty to go through open gates. So if A. and B. were to agree for a lease, it would be implied from custom that the lessor should prepare and the lessee pay for it. Grissell v. Robinson,

3 Bing. N. C. 11. Although in general, upon a sale of property, the vendee who is to bear the expense of the conveyance ought to prepare it. *Price* v. *Williams*, 1 M. & W. 6; *Poole* v. *Hill*, 6 M. & W. 835; *Stephens* v. *De Medina*, 4 Q. B. 422. See, however, *Doe* d. *Clarke* v. *Stilwell*, 8 A. & E. 645. [As to the liability by usage of a man about to marry to pay his wife's solicitor for preparing her marriage settlement, see *Helps* v. *Clayton*, 17 C. B. N. S. 553, 34 L. J. C. P. 1.

In *The North Staffordshire Rail. Co. v. Peek*, E. B. & E. 986, the majority of the court held that the terms in a letter to carriers from their customer, "Please send the marbles *not insured*," were to be read "according to the understanding of language between carriers and their customers," and construed as a request to carry the marbles at the customer's risk. But this decision turned upon the construction of a statute, and was reversed in the House of Lords, 10 H. of L. Ca. 473, 32 L. J. Q. B. 241.

As to a usage of trade to allow goods to remain with hotel-keepers on hire, preventing such goods from being affected by the order and disposition section of the Bankruptcy Acts, see in re Blanshard, 8 Ch. D. 601, and the cases therein cited; Crawcour v. Salter, 18 Ch. D. 53; ex parte Brooks, 23 Ch. D. 261; ex parte Turquand, 14 Q. B. D. 636, 54 L. J. Q. B. 242.

Whilst, however, as we have seen, evidence of custom has been very largely admitted, there are numerous cases in which such evidence is inadmissible, and these will now be dealt with.

Thus] the admissibility of evidence of custom to explain the meaning of a word used in any contract whatever, is subject to this qualification, viz., that if an act of parliament have given a definite meaning to any particular word denoting weight, measure, or number, it must be understood to have been used with that meaning, and no evidence of custom will be admissible to attribute any other to it; per curiam in Smith v. Wilson, 31 B. & Ad. 728; see also Hockin v. Cooke, 4 T. R. 314; The Master of St. Cross v. Lord Howard de Walden, 6 T. R. 338; Wing v. Erle, Cro. Eliz. 267; Noble v. Durrell, 3 T. R. 271.

In Doe v. Lea, 11 East, 312, it was held that a lease by deed of lands since the new style, to hold from the feast of St. Michael, must mean New Michaelmas, and could not be shown by parol evidence to refer to Old Michaelmas. In Furley v. Wood, 1 Esp. 198, Runn. Eject. 112, Lord Kenyon had, under similar circumstances, admitted parol evidence of the custom of the country to explain the meaning of the word Michaelmas: and the court, in Doe v. Lea, on hearing that case cited, asked whether the holding there was by deed, which it does not appear to have been; and to which it may be added, that it appears possible that it was not even in writing.

In Doe v. Benson, 4 B. & A. 588, evidence of the custom of the country was held admissible for the purpose of showing that a letting by parol from Lady-day meant from Old Lady-day. The court referred to Furley v. Wood, and distinguished that case from Doe v. Lea, on the ground that the letting there was by deed, "which," said Holroyd, Justice, "is a solemn instrument; and therefore parol evidence was inadmissible to explain the expression Lady-Day there used, even supposing that it was equivocal."

It is perhaps not easy to conceive a distinction, founded on principle, between the admissibility of evidence to explain terms used in a *deed*, and terms used in a written contract not under seal: for though, when the terms of a deed are ascertained and understood, the doctrine of estoppel gives them a more conclusive effect than those of an unsealed instrument; yet the

rule that parol evidence shall not be admitted to vary the written terms of a contract, seems to apply as strongly to a contract without a seal as with one; while, on the other hand, it appears from the principal case of Wigglesworth v. Dallison, without going further, that in cases where parol evidence is in other respects admissible, the fact that the instrument is under seal forms no insuperable obstacle to its reception. [See also Abbott v. Bates, 43 L. J. C. P. 150.]

Nor does it seem necessary, in order to prevent a contradiction between Doe v. Lea and Doe v. Benson, and Furley v. Wood, to establish any such distinction between deeds and other written instruments; for in Doe v. Benson, the letting seems not to have been in writing, so that the objection to the admission of parol evidence, founded upon the nature of a written instrument, did not arise. In Furley v. Wood the letting was perhaps also by mere parol; and though the evidence was, it is true, offered to explain the notice to quit, still it may be urged, that when the holding was once settled to commence from Old Michaelmas, the notice to quit, which probably contained the words, "at the expiration of your term," or something ejusdem generis, must be held to have had express reference to, and to be explained by it. We must not therefore, it is submitted, too hastily infer that parol evidence of custom would be receivable to explain a word of time used in a lease in writing, but not under seal. [See, however, Rogers v. Hull Dock Co., 34 L. J. Ch. 165, where the evidence was admitted to explain such an agreement.]

Doe v. Lea was acted upon by the Court of Common Pleas in Smith v. Walton, 8 Bing. 238, where the defendant avowed for rent payable "at Martinmas to wit, November 23rd;" the plaintiff pleaded non tenuit; and a holding from Old Martinmas having been proved, the court thought that the words after the videlicit must be rejected, as inconsistent with the term Martinmas, which they thought themselves bound by statute to interpret November 11th; that no evidence was admissible to explain the record: and that there was, therefore, a fatal variance between it and the evidence; see Hockin v. Cooke, 4 T. R. 314; The Master of St. Cross v. Lord Howard de Walden, 6 T. R. 338; Kearney v. King, 2 B. & A. 301; Sproule v. Legge, 1 B. & C. 16. [Hogg v. Berrington, 2 F. & F. 246.

Custom cannot alter or control the law. In Meyer v. Dresser, 16 C. B. N. S. 646; 33 L. J. C. P. 289, which was an action for freight, the defendant sought by evidence of usage, alleged to be universal in the mercantile world, to establish a right to deduct from the amount of freight due for goods delivered the value of certain other goods which ought to have been but were not delivered by the plaintiff, but the court held that "a universal usage which is not according to law cannot be set up to control the law." See also Goodwin v. Robarts, L. R. 10 Ex. 337, at p. 357, 44 L. J. Ex. 162; and the judgment of Blackburn, J., in Crouch v. Crédit Foncier, L. R. 8 Q. B. 386, though the latter is to some extent qualified by that of the Exchequer Chamber in Goodwin v. Robarts, sup. In Crouch v. Crédit Foncier, L. R. 8 Q. B. 386, the court point out that "where the incident" (sought to be introduced by usage into a contract) "is of such a nature that the parties are not themselves competent to introduce it by express stipulation," (e.q., to make a modern instrument negotiable), "no such incident can be annexed by the tacit stipulation arising from usage." See further, Seymour v. Bridge, 14 Q. B. D. 460, 54 L. J. Q. B. 347; Neilson v. James, 9 Q. B. D. 546, 51 L. J. Q. B. 369; Perry v. Barnett, 15 Q. B. D. 388, 54 L. J. Q. B. 466; as to how far a

custom of the Stock Exchange to disregard Leeman's Λ ct, 30 & 31 Vict. c. 29, s. 1, can be held binding.

Again,] evidence of usage, though sometimes admissible to add to, or explain, is never so to vary, or to contradict, either expressly or by implication, the terms of a written instrument, Magee v. Atkinson, 2 M. & W. 442; Adams v. Wordley, 1 M. & W. 374; Trueman v. Loder, 11 A. & E. 589; [see Humfrey v. Dale, E. B. & E. 1004; Hutchinson v. Tatham, L. R. 8 C. P. 482, 42 L. J. C. P. 260; Norden Steamship Co. v. Dempsey, 1 C. P. D. 654, 45 L. J. C. P. 764; The Athambra, 6 P. D. 68, 50 L. J. P. D. 36, though where a custom was admitted to exist and in a charter-party the words "as customary" were written, it was held that the custom must prevail, even though it contradicted a printed term in the charter-party, Scrutton v. Childs, 36 L. T. N. S. 212.]

Thus, in Yeates v. Pym, 6 Taunt. 445, in an action on a warranty of prime singed bacon, evidence was offered of a usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of prime bacon. This evidence was held inadmissible, first at Nisi Prius, by Heath, Justice, and afterwards by the Court of Common Pleas.

In Blackett v. Royal Exchange Insurance Company, 2 Tyrwh. 266 [2 Cr. & J. 2447, which was an action on a policy upon "ship, &c., boat, and other furniture," evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits on the larboard quarter; but was rejected at Nisi Prius, and the rejection confirmed by the Court of Exchequer. "The objection," said Lord Lyndhurst, delivering judgment, "to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture, and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain." [This case, however, is mentioned with disapproval in Myers v. Sarl, 30 L. J. Q. B. 9; and Humfrey v. Dale, supra.

Hall v. Janson, 4 E. & B. 500, was an action upon a policy of marine insurance in the ordinary form, in which the interest was declared to be "on money advanced on account of freight," and the count alleged the interest to be in the shipowner, and that it became subject to a general average contribution: a plea to that count stating a custom of London, where the policy was made, that insurance upon "money advanced on account of freight" should not be liable for a general average, was held bad, the custom alleged being inconsistent with the terms of the policy. [(See, however, Miller v. Titherington, 6 H. & N. 278.)

Where under an alleged usage of trade the underwriters on a marine policy covering loss by jettison sought to be relieved from payment of anything beyond the assured's own proportion of a loss of his goods which had been jettisoned under circumstances constituting a general average, leaving him to recover the residue from the other contributories, the court held the custom bad as contrary to the express agreement of the parties. *Dickenson v. Jardine*, L. R. 3 C. P. 639; 37 L. J. C. P. 321. See also *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

In Hathesing v. Laing, L. R. 17 Eq. 92, 43 L. J. Ch. 233, a custom at Bombay,

making it obligatory on ship captains to require the production of the mate's receipt before signing the bill of lading, was held bad by Bacon, V.-C., sed vide Schuster v. M'Kellar, 7 E. & B. 704.

In several cases alleged customs of ports to take delivery on terms inconsistent with charter-parties have been held inadmissible: *The Alhambra*, 6 P. D. 68; *Hayton v. Irwin*, 5 C. P. D. 130.

In Suse v. Pompe, 8 C. B. N. S. 538, evidence was given of a usage in London that on non-payment by the acceptor of a bill of exchange drawn and indorsed in England, and payable abroad at a certain rate of exchange, the holder is entitled at his election to recover from the drawer either the reexchange, or the amount which he paid for the bill. This evidence was held inadmissible, as contradicting the terms of the bill.

In Willans v. Ayers, 3 App. Cas. 133, 47 L. J. P. C. 1, grave doubts were expressed as to the validity of an alleged custom to allow a fixed percentage of 20 per cent. for exchange, re-exchange, and interest, in cases of certain dishonoured bills, but the point was not decided.

In Roberts v. Barker, i C. & M. 808, the question was whether a covenant in a lease whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. "It was contended," said Lord Lyndhurst, delivering judgment, "that the stipulation to leave the manure, was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." Accord. Clarke v. Royston, 13 M. & W. 752. See further, Reading v. Menham, 1 M. & Rob. 236; [Clarke v. Westrope, 18 C. B. 765]; Foster v. Mentor Life Assurance, 4 E. & B. 48.

[As to the meaning of the rule prohibiting a "contradiction" of the instrument, see some valuable remarks in the judgment of the Queen's Bench, in Humfrey v. Dale, 7 E. & B. 266, cited ante, p 586, and per Lord Blackburn, in Tucker v. Linger, 8 App. Cas., at p. 511. In Fleet v. Murton, L. R. 7 Q. B. 132, Blackburn, J., admitting his "difficulty in making out how the custom could make the broker, who was, in fact, not contracting as purchaser, liable in the terms of the count in that case (Humfrey v. Dale), which charged the defendant as a purchaser," suggests that the true view of the broker's liability under the custom is as a del credere agent, who guarantees a purchaser. See Humfrey v. Dale, discussed in Myers v. Sarl, 30 L. J. Q. B. 9, and by Jessel, M. R., in Southwell v. Bowditch, 45 L. J. C. P., at p. 361.

In Hutchinson v. Tatham, L. R. 8 C. P. 482, in which evidence of usage was admitted to charge the defendant as principal on a charter-party, which he had signed "as agent for the merchants" only, Brett, J., says "the cases have lately gone very far as to the admissibility of evidence of custom. It is clear, however, that no such evidence can be admitted to contradict the plain terms of a document. If evidence were tendered to prove a custom that the defendants should be liable as principals under all circumstances, that would contradict the document; but it has been decided that though you

cannot contradict a written document by evidence of custom, you may add a term not inconsistent with any term of the contract. What I apprehend, it is here attempted to add, is not that the defendants would be liable as principals in the first instance, or under all circumstances, but that though primât facie, and in most cases the brokers are mere agents, yet if they fail to disclose the names of the principals within a reasonable time, they, the agents, may on the happening of this contingency be principals. This is not, I think, on the whole, inconsistent with the contract, and, therefore, with some doubt, I think the evidence was admissible."

In Robinson v. Mollett, L. R. 5 C. P. 646, 7 Id. 84, 7 H. L. 802, 41 L. J. C. P. 65, 44 Id. 362, the plaintiff, a London tallow broker, sought to be indemnified by the defendant against the loss upon a contract for the purchase of tallow. The defendant had instructed the plaintiff to purchase fifty tons of tallow, as broker, for him. The plaintiff, acting for other buyers as well as the defendant, bought 150 tons. He forwarded a bought note to the defendant for the fifty tons, and to the vendors a sold note for the 150 tons, but made no contract for the purchase of fifty tons on behalf of the defendant, on which the latter could come forward as principal, his intention being to appropriate fifty of the 150 tons to the defendant. The defendant refused to take delivery of the fifty tons, and the market having fallen the plaintiff was obliged, according to the usage of the trade, to pay the vendor the difference of price: and this loss he sought to recover from the defendant. It was conceded that apart from usage there was no fulfilment of the defendant's order for fifty tons, and he could not be compelled to take the tallow or indemnify the plaintiff; but it was contended on behalf of the latter, that he was justified by the usage of the London tallow market, though unknown to the defendant, in fulfilling the order in this way. In the Common Pleas, Bovill, C. J., and Montague Smith, J., were in favour of the usage. Willes and Keating, JJ., were of a contrary opinion, on the ground that "the authority of the brokers was to buy as brokers for their principal, not to sell to him. If the sale had been consummated in the course insisted upon by the brokers, the principal would have bought them of his own brokers and no one else. A custom of trade may control the mode of performance of a contract, but cannot control its intrinsic character. usage unknown to the principal can justify a broker in converting himself into a principal seller." On appeal, the Court of Exchequer Chamber was equally divided, but the House of Lords were unanimous in holding the custom to be invalid. See also Hamilton v. Young, 7 L. R. Ir. 289, where a custom of the Stock Exchange authorising brokers entitled to sell their customers' securities to take them for themselves at the price of the day, was held unreasonable, and not binding on the customer, and McDevitt v. Connolly, 13 L. R. Ir. 207; also Barrow v. Dyster, 13 Q. B. D. 635, where a custom in the hide trade to make the selling broker liable on a contract if he did not disclose the name of his principal within a reasonable time, was held inconsistent with a term in that contract by which disputes were to be referred to the arbitration of the selling broker.

Terms not incidental to those expressed in the written contract cannot be annexed to it by oral evidence of a particular usage of trade. Thus a charterer of a vessel for a voyage from here to China, the ship to be consigned to his agents there, free of commission, sought in vain upon the strength of a particular custom to add to the charter a term that the agents in China should be entitled to procure charters for the return voyage from China and

be paid commission on the amount of freight mentioned in such charters, *Philips* v. *Briard*, 1 H. & N. 211. And see *Gibson* v. *Crick*, 1 H. & C. 142; *Allan* v. *Sundius*, Id. 123.

In Hutcheson v. Euton. 13 Q. B. D. 861, the plaintiffs had bought goods of the defendants, who were brokers, but on the face of the contract sold as principals. The contract contained a clause providing that "any dispute arising on it was to be settled by arbitration." The plaintiffs alleged that the goods were of inferior quality, and the matter having been referred to arbitration, the arbitrators decided in favour of the defendants, on the ground of the existence of a custom relieving them from liability if, as was the fact, they disclosed the names of their principals. It was held by Brett, M. R., and Bowen, L. J., diss. Fry, L. J., that in finding the existence of this custom the arbitrators had exceeded their jurisdiction, whether the evidence of the custom was admissible or not. In this case a jury negatived the existence of the custom.

A custom or usage, to be binding, at any rate on those not acquainted with it, must be reasonable, and the question of reasonableness is for the court. See Co. Litt. 56 b., Leuchardt v. Cooper, 3 Bing. N. C. 99, 5 Id. 128; Tyson v. Smith, 9 A. & E. 421; Gibson v. Crick, 1 H. & C. 142; Duncan v. Hill, L. R. 8 Ex. 242, 42 L. J. Ex. 179; Merry v. Nickalls, L. R. 7 Ch. 733, 7 H. L. 530, 41 L. J. Ch. 767, 45 Id. 575; Down v. City of London Brewery Co., L. R. 8 Eq. 155; Bradburn v. Foley, 3 C. P. D. 129, 47 L. J. C. P. 331; Pierson v. Scott, 9 Ch. D. 198, 47 L. J. Ch. 705; Perry v. Barnett, 15 Q. B. D. 388, 54 L. J. Q. B. 466. Where, however, in a bill of lading for goods shipped for London, it was provided that "average, if any, should be adjusted according to British custom," and a fire having broken out in the ship, water was poured in to extinguish it, and injured the goods mentioned in the bill of lading; it was held that though by British law such loss was a general average loss, still as the practice of British average adjusters was not to allow it as such, the parties must be bound by that practice, "though it might be according to the best opinion vicious and unreasonable;" Stewart v. West India Steamship Co., L. R. 8 Q. B. 88, 362.] When evidence of usage is admitted, evidence may be given in reply, tending to show such usage to be unreasonable. Bottomley v. Forbes, 5 Bing. N. C. 128.

As to the admissibility and effect of previous usage between the parties to a contract, see *Bourne* v. *Gatliffe*, 11 Cl. & Fin. 45; *Ford* v. *Yates*, 2 M. & G. 549; 2 Scott, N. R. 645, S. C.: [Gumming v. Shand, 5 H. & N. 95, 29 L. J. Exch. 129. And as to the evidence of usage between other parties in the same trade to show the reasonableness of a contract, see *Rowclifte* v. *Leigh*, 6 Ch. D. 256, 46 L. J. Ch. 60.

Parol evidence is inadmissible to show that the parties to a written contract intended to exclude the incorporation into it of a customary incident. Fawkes v. Lamb, 31 L. J. Q. B. 98.

As to what is sufficient evidence to establish a usage in a trade, see Mackenzie v. Dunlop, 3 Macq. H. of L. C. 22; Dent v. Nickalls, 22 W. R. 218; Abbott v. Bates, 43 L. J. C. P. 150. Ex parte Powell, 1 Ch. D. 501; 44 L. J. Ch. 122, 311. In re Witt, 2 Ch. D. 489; Willans v. Ayers, 3 App. Cas. 133, 47 L. J. P. C. 1; Nelson v. Dahl, 12 Ch. D. 576; Wildy v. Stephenson, 1 Cab. & El. 3; Knight v. Cotesworth, 1 Cab. & El. 51, per Mathew, J. In Fleet v. Murton, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49, evidence of custom in the London colonial market was held admissible in proof of a similar custom in the London fruit trade.]

Lord Eldon, in Anderson v. Pitcher, 2 B. & P. 168, expressed an opinion, that the practice of admitting usage to explain contracts ought not to be extended. See also the expression of the court in Trueman v. Loder, 11 A. & E. 589; and Johnstone v. Usborne, Ibid. 549. [But the tendency of the courts appears now to be the other way. See Humfrey v. Dale, 7 E. & B. 266, E. B. & E. 1004; Hutchinson v. Tatham, L. R. 8 C. P. 482, 42 L. J. C. P. 260.]

In Cross v. Eglin, 2 B. & Ad. 106, evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for "300 quarters (more or less) of foreign vye," could not, consistently with the usage of trade, be required to receive so large an access as 45 quarters over the 300: the question as to the admissibility of the evidence ultimately proved immaterial; but Littledale, J., said that where words were of such general import, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning. See Lewis v. Marshall, 8 Scott, N. R. 477; 7 M. & G. 729, per curiam. Moore v. Campbell, 10 Exch. 323; Bourne v. Seymour, 16 C. B. 337. [Carter v. Crick, 4 H. & N. 412. It is not, however, necessary that the phrase should be itself "ambiguous," per Blackburn, J., Myers v. Sarl, 30 L. J. Q. B. 9; and see Alcock v. Leeuw, 1 Cab. & El. 98.]

It is right to observe, that though in certain cases above pointed out evidence of usage is received to explain the terms used in a contract, yet, when the jury have decided on the meaning of those terms, it is not for them but for the court to put a construction upon the entire contract or document. Hutchinson v. Bowker, 5 M. & W. 535, and the judgment in Neilson v. Harford, 8 M. & W. 806. [Bowes v. Shand, 2 App. Cas. 455, 462.]

Usage and custom distinguished.— The decisions on the subject of usages are numerous, but are not always reconcilable. "Each case must be determined by itself, aided by such light as may be derived from the judgments in other cases when the facts are analagous." Steel Works v. Dewey, 37 Ohio St. 242, 250. Though custom and usage are often used as convertible terms; yet, strictly speaking, custom is that length of usage which has become law. A general custom is the common law itself, or a part of it. Walls v. Bailey, 49 N. Y. 464, 471. This distinction is also adverted to in Clark v. Baker, 11 Met. 186, 188; Morning Star v. Cunningham, 110 Ind. 328, 334; Jackson v. Railroad Co., 48 Me. 147; Wood v. Watson, 53 Id. 300. However, the terms are often used as synonymous. McMasters v. Penn. R. R., 69 Pa. St. 374; Carter v. Coal Co., 77 Id. 286; U. S. v. Buchanan, 8 How. 83, 102, 103.

"A usage, which is also called a custom, though the latter word has also another signification, is a long and uniform practice, applied to habits, modes and courses of dealing. It relates to modes of action, and does not comprehend the mere adoption of certain peculiar doctrines or rules of law." Chapman, J.,

in Dickinson v. Gay, 7 Allen 35; Maey v. Whaling Ins. Co., 9 Met. 354, 362. At an early day courts expressed regret at the extension of this species of evidence; notably Mr. Justice Story in Donnell v. Columbian Ins. Co., 2 Sum. 367, 377. See also Clark v. Baker, 11 Met. 186, 188; Susquehanna Fertilizer Co. v. White, 66 Md. 444, 455; Howe v. Mutual Ins. Co., 1 Sandf. 137, 149; Beals v. Terry, 2 Id. 127, 130; Coxe v. Heisley, 19 Pa. St. 243, 246. If usages contrary to the law "were to prevail they would be productive of misunderstanding, litigation and frequent injustice, and would be deeply injurious to the interests of trade and commerce." Dickinson v. Gay, supra, p. 37.

Violation or interpretation of contract. - Usage will not be allowed to vary the terms of an express contract, embodying in clear and positive terms the intention of the parties. Hence it is not admissible to vary the terms of a policy of insurance. Grace v. American Ins. Co., 109 U.S. 278; Franklin Ins. Co. v. Sears, 21 Fed. Rep. 290; Castleman v. Southern Mut. Life Ins. Co., 14 Bush 197, 202; Sterling Organ Co. v. House, 25 W. Va. 64, 96. "There can be no doubt that, in the interpretation of written contracts, especially those of a mercantile character, evidence of usage is competent and frequently admitted, to explain the sense in which particular words or phrases are used, and to show that, as applied to the subject matter, the language of the instruments was understood by the parties to have a special and peculiar meaning, differing from that which might ordinarily be attributed to it; especially is this true in respect to policies of insurance. These contracts, like others of a mercantile nature, when first introduced as subjects of exposition in the courts of common law, contained many loose, undefined, and indeterminate words and phrases, which, if interpreted literally, and without reference to the course of trade and the customs of merchants, would have increased the risk assumed by the insurers or abridged the indemnity secured to the assured, contrary to the real intentions of the parties. But it is obvious that the necessity which gave rise to the liberal rules which have heretofore been adopted by courts of justice in admitting usages as explanatory of this class of customs has in great measure ceased to exist. By a long course of judicial decisions, that which was originally indefinite and uncertain and difficult of application in the language of the

instrument has become clear, determinate, and well settled. The consequence is, that of late years, the tendency of courts of law has been to apply the rules regulating the competency of usages to explain and interpret the language of written instruments with great strictness, and to guard with increased vigilance against the danger of allowing extrinsic evidence to vary or control the words in which the parties have deliberately expressed their meaning. Many of the early authorities in England and in this country go much farther in the admission of testimony to prove usages for the purpose of aiding in the interpretation of written contracts than would be deemed to be reasonable or safe at the present day. We are inclined to doubt whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage in a policy which is susceptible of a clear and definite exposition in conformity to the interpretation of the words as established by adjudicated cases has another and different meaning by mercantile usage from that which has been so recognized and settled." Bigelow, C. J., in Seccomb v. Provincial Ins. Co., 10 Allen 305, 313; Macomber v. Howard Ins. Co., 7 Gray 257; Odiorne v. New England Ins. Co., 101 Mass. 551; Burnham v. Boston Ins. Co., 139 Mass. 399, 404; Beer v. Ins. Co., 39 Ohio St. 109; Ins. Co. v. Wright, 1 Wall. 456; Partridge v. Ins. Co., 15 Id. 373; Sperry v. Springfield Ins. Co., 26 Fed. Rep. 234; First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461; Franklin Ins. Co. v. Humphrey, 65 Ind. 549; Park v. Ins. Co., 48 Ga. 601.

So evidence is inadmissible to vary any contract susceptible of a plain meaning. Hartje v. Collins, 46 Pa. St. 268; Ware v. Hayward Rubber Co., 3 Allen 84; Potter v. Smith, 103 Mass. 68; Davis v. Galloupe, 111 Id. 121; Brown v. Foster, 113 Id. 136; Stansbury v. Kephart, 54 Ia. 647; Smyth v. Ward, 46 Id. 339, 345; Randolph v. Halden, 44 Id. 327, 329; Phillips v. Starr, 26 Id. 349; Cash v. Hinkle, 36 Id. 623; Stebbins v. Brown, 65 Barb. 274; Polhemus v. Heiman, 50 Cal. 438; Rafert v. Scroggins, 40 Id. 195; Atkinson v. Allen, 29 Id. 375; Exchange Bank v. Cookman, 1 W. Va. 69; Cooke v. England, 27 Md. 14, 36; Groat v. Gile, 51 N. Y. 431; Collender v. Dinsmore, 55 Id. 200, 208, 209; Whitmore v. Iron Co., 2 Allen 52; Schenck v. Griffin, 38 N. J. (Law) 462, 471; Stervard v. Scudder, 4 Zab. 96; Bigelow v. Legg, 102 N. Y. 652; Union Trust Co. v. Whiton, 47 Id. 172, 180.

To this rule that usage cannot vary the terms of a written contract, there is an exception in the case of language which is ambiguous, and used in different senses, or in the case of general words used in a new, peculiar, or technical sense; Brown v. Brown, 8 Met. 573, 576. It is sufficient in the case of a policy of insurance if the usage is known and generally acted on where the contracting parties reside; Fulton Co. v. Milner, 23 Ala. 420, 428. Cases where evidence of such usage has been admitted are: Brown v. Brown, supra; Coit v. Commercial Ins. Co., 7 Johns. 385. See Johns. Cas. 289; Astor v. Union Ins. Co., 7 Cowen 202; Macy v. Whaling Ins. Co., 9 Met. 354, 362; Winthrop v. Union Ins. Co., 2 Wash. C. C. 8; Hinten v. Loche, 5 Hill 437; Allegre v. Ins. Co., 6 Harr. & J. 408; Allegre v. Maryland Ins. Co., 2 Gill & J. 137; Lawrence v. McGregor, 5 Ohio 309; Avery v. Stewart, 2 Conn. 69; see, also, Roberts v. Button, 14 Vt. 195, 203; see Eyre v. Marine Ins. Co., 5 W. & S. 116; S. C. 6 Whart. 247; Leach v. Beardslee, 22 ('onn. 404. It will be observed that most of the above are early cases, many of them involving the interpretation of policies of insurance. Upon this subject, therefore, the remarks of Mr. Chief Justice Bigelow, in Seccomb v. Provincial Ins. Co., supra, that the necessity of "admitting usages as explanatory of this class of customs has in great measure ceased to exist," are pertinent. But even in earlier times there was often a disinclination to extend the doctrine. In Gordon v. Little, 8 S. & R. 533, Gibson, J., dissented from the opinion of the majority of the court, that evidence of usage was admissible to explain the meaning of "inevitable dangers of the river" in a bill of lading, and that river boatmen assume a responsibility different from that of common carriers. And the dissenting opinion is now law; Coxe v. Heisley, 19 Pa. St. 247. See Wetherill v. Neilson, Id. 453; Dean v. Swoop, 2 Binn. 72; Sampson v. Gazzam, 6 Port. 124. In Sleght v. Rhinelander, 1 Johns. 192, evidence of the commercial meaning of "sea letter" was held inadmissible; but see S. C. 2 Id. 531. Other early cases which hold that usage is inadmissible to control the clear meaning of a contract are: Macomber v. Parker, 13 Pick. 176, 182, holding that "it would only prove how other parties had considered similar contracts": Rice v. Codman, 1 Allen 377; Ripley v. Crooker, 47 Me. 370; Keener v. Bank of U. S., 2 Pa. St. 237; Cox v. Peterson, 30 Ala. 612;

Insurance Co. v. Wright, 1 Wall. 456; Barlow v. Lambert, 28 Ala. 710; Werner v. Footman, 54 Ga. 128; Whitmore v. Steamboat, 20 Mo. 513; Chouteau v. Steamboat, Id. 519; Hursh v. North, 40 Pa. St. 243; The Sch. Reeside, 2 Sum. 568; Turney v. Wilson, 7 Yerg. 340; McArthur v. Sears, 21 Wend. 194; Knox v. Rives, 14 Ala. 249, 259; Aymar v. Astor, 6 Cow. 266 (Savage, C. J., dissenting); Rankin v. Am. Ins. ('o., 1 Hall. 619; Lewis v. Thatcher, 15 Mass. 431; Homer v. Dorr, 10 Id. 266; Barksdale v. Brown, 1 N. & McC. 517 (Cheeves, J., dissenting); Allan v. Dykers, 3 Hill 593; Otsego Bank v. Warren, 18 Barb. 296; Gross v. Criss, 3 Gratt. 262. Although the tendency is to reject evidence of usage in violation of the terms of express agreements, yet the later decisions often favor its admission in doubtful cases. In Burnham v. Boston Marine Ins. Co., 139 Mass. 399, it was stated by Mr. Justice Field, that "a written contract must be construed according to its terms in their ordinary signification, unless those terms, by usage in the business or between the parties, have a different meaning," and evidence was held inadmissible that, before the contract of insurance was executed, the parties agreed to insure "outfits" under the term "advances." But in Mooney v. Howard Ins. Co., 138 Mass. 375, evidence was admitted in an action on a policy against loss by fire on a junk-dealer's stock of "rags" and "old metals" that, by a usage of the trade, those terms had acquired a broader signification than commonly belongs to them. As to the meaning of "fancy-goods and Yankee-notion store" in a policy of insurance, see Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188, 193. Evidence is inadmissible to change the legal effect of a deed, Tucker v. Smith, 68 Tex. 473, or to alter or modify the express provision of a contract for the sale of barley; Gibney v. Curtis, 61 Mo. 192; or that when one sells or transfers a promissory note, he is to "indorse," although not expressed in the terms of the contract; Paine v. Smith, 33 Minn. 495, 499, 500. Evidence has been admitted to show the meaning of the word "day" in case of the sale of a reaping machine with right to test it for a day; Fuller v. Schroeder, 20 Nebr. 63. Also to show that a boat which belongs to a vessel passes by sale, though not mentioned in the bill of sale; The Merrimac, 29 Fed. Rep. 157. So evidence is admissible to show that certain terms, hardly intelligible in themselves, from not being in ordinary use or from being used in a peculiar or

technical way, have a recognized and well-known meaning in a special trade; Page v. Cole, 120 Mass. 37. See Whitney v. Boardman, 118 Id. 242; Swett v. Shumway, 102 Id. 365; Miller v. Stevens, 100 Id. 518; Eaton v. Smith, 20 Pick. 156; Daniels v. Hudson River Ins. Co., 12 Cush. 416; Silberman v. Clark, 96 N. Y. 522; Harris v. Rathbone, 2 Keyes 312; Bissell v. Campbell, 54 N. Y. 353; Pilmer v. Bank, 16 Ia. 321; Hibler v. McCartney, 31 Ala. 501; Kiraball v. Brauner, 47 Mo. 398; Wilbraham v. Stanley, 57 Cal. 476; Stever v. Dwyer, 31 Ia. 20; Busch v. Pollock, 41 Mich. 64; Bancroft v. Peters, 4 Id. 619. It is said in the late case of Susquehanna Fertilizer Co. v. White, 66 Md. 444, 454 (1886), that "it cannot be controverted, that the principle has been established by adjudication, that in commercial instruments and written contracts the usage of a particular trade, profession, or place may be proved for the purpose of ascertaining the meaning of certain words, the signification of which may be doubtful. It is not to be denied that if a word has acquired a peculiar meaning in a certain trade or business, either local or general, that meaning will be applied to it in the construction of written instruments affecting the transactions growing out of that trade or business; but the fact that the word has acquired such meaning must be distinctly proved by the adduction of satisfactory evidence;" Allegre's Adm'rs v. Md. Ins. Co., 2 Gill & J. 137; Taylor v. Briggs, 2 Carr. & P. 525; Murray v. Hatch, 6 Mass. 465; Coit v. Commercial Ins. Co., 7 Johns. 385.

"And it is apparent that the tendency of the American decisions is to restrict, rather than to extend, the application of the principle first established by the sanction of judicial authority in England, and subsequently recognized and adopted in this country." See Linsley v. Lovely, 26 Vt. 123; Girard Life Ins. Co. v. Mutual Life Ins. Co., 86 Pa. St. 236; S. C. 97 Id. 15.

Another qualification of this rule arises where it is presumed that contracts are drawn in reference to the usages which apply to them. "Custom or usage is properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and such evidence is used on the theory that the parties knew of the existence of the custom or usage and contracted in refer-

ence to it"; Robinson v. U. S., 13 Wall. 363. This principle is illustrated in a great variety of commercial cases; Warren Bank v. Parker, 8 Gray 221; Cook v. Walsh, 9 Allen 350; Have v. Hardy, 106 Mass. 329; Scudder v. Bradbury, Id. 422; Howard v. Ins. Co., 109 Id. 384; Porter v. Hills, Id. 114, Id. 106; Schnitzer v. Print Works, 114 Id. 123; Florence Machine Co. v. Daggett, 135 Id. 582, 583; Walls v. Bailey, 49 N. Y. 464; Doaner v. Demhorn, 79 Ill. 131; Fitzsimmons v. Academy, 10 Mo. App. 595; Sontier v. Kellerman, 18 Mo. 509; Martin v. Hall, 26 Id. 386; Freight Co. v. Stannard, 44 Id. 71; Walker v. Barron, 6 Minn. 508; Hinton v. Coleman, 45 Wis. 465; Steel Works v. Dewey, 37 Ohio St. 242; Barker v. Borzone, 48 Md. 474, 492; Lyon v. George, 44 Id. 295; Hendrick v. Robinson, 56 Miss. 694; Dalton v. Daniels, 2 Hilton (N. Y.) 272; Me-Manes v. Donohue, 7 Alb. L. J. 411: White v. Fuller, 4 Hun 631; McPherson v. Cox, 86 N. Y. 472; Ragland v. Butler, 18 Gratt. 323; Bryan v. Spurgin, 5 Sneed 681; Perkins v. Jordan, 35 Me. 23; Folsam v. Marine Ins. Co., 38 Id. 414; Gleason v. Walsh, 43 Id. 397; Manett v. Brackett, 60 Id. 524; Hursh v. Chorth, 40 Pa. St. 241; Carter v. Coal Co., 77 Id. 286; Cooper v. Berry, 21 Ga. 526; Loyd v. Wight, 20 Id. 574; Morton v. Morris, 31 Id. 378; Garmany v. Rust, 35 Id. 108; Mott v. Hall, 41 Id. 117. "A person who deals in a particular market must be taken to deal according to the known, general and uniform custom or usage of that market; and he who employs another to act for him, at a particular place or market, must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not;" Bailey v. Bensley, 87 Ill. 556, 559; Lyon v. Culberston, 83 Id. 33; United States Life Ins. Co. v. Advance Co., 80 Id. 549; Cothran v. Ellis, 107 Id. 413, 419; Everingham v. Lord, 19 Bradw. 565, 569. See Kraft v. Fancher, 44 Md. 204; Barse v. Morton, 43 Hun 479; Bullock v. Finley, 28 Fed. Rep. 514; Neill v. Billingsley, 49 Tex. 161; Frederick v. Railroad Co., 37 Mich. 342; Leach v. Beardslee, 22 Conn. 404; Grinman v. Walker, 9 Iowa 426; Bissell v. Ryan, 23 Ill. 571. See the following early cases: Taylor v. Wells, 3 Watts 65; Harrington v. McShane, 2 Id. 443; Kemp v. Coughtry, 11 Johns. 107; Galloway v. Hughes, 1 Bailey 553; Hosea v. McCrory, 12 Ala. 350, 353; U. S. v. McDaniel, 7 Pet. 3, 15; DeForest v. Fire Ins. Co., 1

Hall 84; Ruan v. Gardner, 1 Wash. C. C. 146, 149; Townsend v. Whitby, 5 Harr. 55.

In many of the above cases usage was admitted in evidence in the absence of express contracts and of circumstances definitely fixing the legal rights of the parties. In many of them also, the usage was reasonably understood as forming a part of an express contract. Williams v. Gilman, 3 Greenl. 276; Van Ness v. Packard, 2 Pet. 138; Sewall v. Gibbs, 1 Hall 602; Conner v. Robinson, 2 Hill (S. C.) 354. See further Alabama R. R. v. Kidd, 29 Ala. 226; Dixon v. Dunham, 14 Ill. 322; Barker v. Brace, 3 Conn. 10, 13, Ware 322; Chase v. Washburn, 1 Ohio St. 252; U. S. v. Fillebrown, 7 Pet. 30, 50; Clark v. Baker, 11 Met. 186; Bridgeport Bank v. Dyer, 19 Conn. 136; Barton v. McKelway, 2 Zab. 165, 175; Bank of Utica v. Smith, 18 Johns. 280; Thomas v. O'Hara, 1 Mill's Const. (S. C.) 303, 308; Consequa v. Willings, 1 Pet. C. C. 172, 225; Wilcox v. Wood, 9 Wend, 349.

There is also a well-established usage in relation to the contract of endorsement, the endorser being bound without personal notice. It is the usage of particular banks, as to the time of demanding payment and giving notice, although differing from the time fixed by the general law merchant. Bank of Washington v. Triplett, 1 Pet. 25; Cookendorfer v. Preston, 4 How. 317, 326; Adams v. Otterbach, 15 Id. 539; Renner v. Bank of Columbia, 9 Wheat. 582; Mills v. Bank of U.S., 11 Id. 431; Bank of Columbia v. Fitzhugh, 1 Harr. & G. 239; Jones v. Fales, 245; Lincoln Bank v. Page, 9 Id. 155; Blanchard v. Hilliard, 11 Id. 85; Pierce v. Butler, 14 Id. 303; Dorchester Bank v. New England Bank, 1 Cush. 177, 188; Kilgore v. Buckley, 14 Conn. 363; Whitwell v. Johnson, 17 Mass. 549; City Bank v. Cutter, 3 Pick. 414; Chicopee Bank v. Enger, 9 Met. 583. For some cases, see Halsey v. Brown, 3 Day 346; Allen v. Merchants Bank, 22 Wend. 215; Van Santwood v. St. John, 6 Hill 158; Cliven v. Screw Co., 23 How. 421.

Contravention of rules of law.—It is laid down as a general proposition that usage is never admissible to vary or control a general principle or rule of law. A thorough discussion of this subject will be found in Barnard v. Kellogg, 10 Wall. 384 and Dickinson v. Gay, 7 Allen 29. The former was the case of a sale of wool, and it was held that the rule of caveat emptor applied, evidence being inadmissible of an implied warranty of

the seller to the purchaser that wool in bales is not falsely or deceitfully packed. It appears that the parties also did not know of the custom. Mr. Justice Davis said, "It is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not on the admitted facts imply a warranty of the good quality of the wool, and no custom in the sale of the article can be admitted to imply one" (p. 391). See also Irwin v. Williar, 110 U. S. 499; Allen v. St. Louis Bank, 120 U. S. 20, 39.

In Massachusetts the law is in harmony with the above decision. Dickinson v. Gay, supra, was the case of a sale of cases of satinets made by samples. There was in both samples and goods a latent defect not discoverable by inspection, or until the goods were printed, so that they were unmerchantable. The contention that there was a warranty implied from the sale that the goods were merchantable was not entertained by the court, but it was held that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject and therefore void. See Dodd v. Farlow, 11 Allen 426; Hedden v. Roberts, 134 Mass. 38.

Evidence is inadmissible to show a custom among brokers to charge a fee to both parties. Commonwealth v. Cooper, 130 Mass. 285; Farnsworth v. Hemmer, 1 Allen 494; Raisin v. Clark, 41 Md. 158. So of the practice to charge fees not in law taxable. Celluloid Manfg. Co. v. Chandler, 27 Fed. Rep. 9; Cutter v. Howe, 122 Mass. 541, 546, 549; see Commonwealth v. Perry, 139 Mass. 198, 201.

In New York the law is in entire harmony with the above. Frith v. Barker, 2 Johns. 327; Woodruff v. Merchants' Bank, 25 Wend. 673; Beirne v. Dord, 5 N. Y. 95; Simmons v. Law, 3 Keys 219; West v. Kiersted, 15 W. D. 549; Babcock v. New York Railroad Co., 20 Id. 477; Wheeler v. Newbould, 16 N. Y. 392; Higgins v. Moore, 34 Id. 417; Corn Exchange Bank v.

Nassau Bank, 91 Id. 74; Case v. Perew, 34 Hun 130; Wright v. Boller, 42 Hun 77, 80. In Pennsylvania the case of Snowden v. Warder, 3 Rawle 101, was decided in contravention of the principle above-stated; but the law in that state is now in harmony with that of Massachusetts and New York. Coxe v. Heisley, 19 Pa. St. 247; Wetherill v. Neilson, 20 Id. 453. Upon this subject see, also, Brown v. Jackson, 2 Wash. C. C. 24; U.S. v. Buchanan, 8 How. 83, 102; West v. Ball, 12 Ala. 340, 347; Dewees v. Lockhart, 1 Tex. 535, 537; Rapp v. Palmer, 3 Watts 178; Sweet v. Jenkins, 1 R. I. 150; Beckwith v. Farnum, 5 Id. 231; Bissell v. Ryan, 23 Ill. 571; Webster v. Granger, 78 Id. 230; Gifford v. MeArthur, 55 Mich. 535; Middleton v. Heyward, 2 Nott & McC. 9, 3 Id. 121; Singleton v. Hilliard, 1 Strob. 203, 216; Blakeslee v. Directors of the Poor, 102 Pa. St. 274; Inglebright v. Hammond, 19 Ohio 337; Antomarchi v. Russell, 63 Ala. 356, 361; Garrett v. Trabuc, 82 Ala. 227, 233; Ober v. Carson, 62 Mo. 209. A custom that a party having a claim for money due upon a contract may not sue at law, is invalid. Manson v. Grand Lodge, 30 Minn. 509; Thompson v. Ins. Co., 104 U.S. 252; Franklin Ins. Co. v. Humphrey, 65 Ind. 54; Spears v. Ward, 48 Id. 541; Wallace v. Morgan, 23 Id. 399; Bauer v. Samson Lodge, 102 Id. 262, 271. A custom which would excuse a corporation from acts of negligence is invalid. Chicago & Rock Island R. R. v. Harmon, 12 Bradw. 54, 61; Transportation Co. v. Storey, 50 Md. 4; Miller v. Pendleton, 8 Gray 547. The custom of "ringing up" among brokers and commission merchants which has been held to be valid when not in contravention of the law is stated in Ward v. Vosburgh, 31 Fed. Rep. 12; Irwin v. Williar, 110 U. S. 499. Usage is not admissible to control the rules of law as to the mode in which a loss under a policy shall be computed. Howland v. India Ins. Co., 131 Mass. 239, 252; Eager v. Atlas Ins. Co., 14 Pick. 141; Thwing v. Great Western Ins. Co., 111 Mass. 93, 109; Matheson v. Equitable Ins. Co., 118 Id. 209, 214; Seccomb v. Provincial Ins. Co., 10 Allen 305. But see Fulton Ins. Co. v. Milner, 23 Ala. 420, 427.

In this connection the following words from Dickinson v. Gay, 7 Allen 29, 36, 37 are important. In most cases where evidence of a usage is admitted, the reference is "to the methods of transacting business, and not to the mere adoption of a peculiar or local rule of law, contrary to the terms of the contract-

or to a general rule of law applicable to its construction. But even this distinction is nice and will not reconcile all cases; and in many instances a usage has been sustained or rejected on the ground that it was or was not regarded by the court as reasonable; and the question whether it was contradictory to a principle of law, or to the terms or legal operation of a contract, was not adverted to."

Effect on statutes. - It is a general rule that usage cannot control or contradict a statute, but this is plainly a branch of the law just treated. Where there is explicit statutory regulation it prevails. Barnes v. Bakersfield, 57 Verm. 375; Dunham v. Dey, 13 Johns. 40; Dunham v. Gould, 16 Id. 367; Albright v. County of Bedford, 106 Pa. St. 582; Hatcher v. Comer, 73 Ga. 418, 421; Osborne v. C. N. Nelson Co., 33 Minn. 285; Ingham v. Lindeman, 37 Ohio St. 218; Perkins v. Franklin Bank, 21 Pick. 483; Rogers v. Allen, 47 N. H. 529; Morrison v. Bailey, 5 Ohio St. 13; O'Connor v. North Truckee Co., 17 Nev. 245, 258; Rivers v. Burbank, 13 Id. 398; Delaplane v. Crenshaw. The customary interpretation of a statute is sometimes considered. Cameron v. Bank, 37 Mich. 240; Helmle v. Life Ins. Co., 61 Pa. St. 107; Governer v. Withers, 5 Gratt. 24. And it has been held that a practical construction given to a statute by custom is equivalent to a positive law. Commissioners v. Bemting, 111 Ind. 143. Generally a measure of weight established by statute cannot be affected by usage. Evans v. Meyers, 25 Pa. Stat. 114; Green v. Moffet, 22 Mo. 529. But see Bonham v. Railroad Co., 13 S. C. 267. In California the statutes recognize customs in regard to the location, etc., of mining claims. Thompson v. Spray, 72 Cal. 528, 532; Colman v. Clements, 23 Id. 245; Morton v. Solambo Co., 26 Id. 527, 534; Original Co. v. Winthrop Co., 60 Id. 631; Harvey v. Ryan, 42 Id. 626; Bradley v. Lee, 38 Id. 362. Usage is no defence to an indictment for crime. Bankers v. State, 4 Ind. 113.

Requisites of valid usage.— If otherwise unobjectionable, usage is only admissible when certain, reasonable, and sufficiently ancient to afford a presumption that it is generally known. U. S. v. Buchanan, 8 How. 102; The Titania, 19 Fed. Rep. 101; Blakemore v. Heyman, 23 Id. 648; Byrne v. Massasoit Packing Co., 137 Mass. 313; Phænix Ins. Co. v. Frissell, 142 Id. 513, 515; Sterling Organ Co. v. House, 25 W. Va. 64, 96; Janney v. Boyd, 30 Minn. 319; Wilson v. Bauman, 80

Ill. 493; Jones v. Wagner, 66 Pa. St. 449; Farmers' Bank v. Champlain Co., 23 Vt. 186, 193; Munn v. Burch, 25 Ill. 356; Johnson v. Railroad, 46 N. H. 213; I. & G. R. R. Co. v. Hassell, 62 Tex. 256. If the usage is not actually known to the contracting parties it must "be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto." Walls v. Bailey, 49 N. Y. 464, 474; Bank v. Erie Railroad Co., 72 N. Y. 188; Jacob v. Storev, 48 N. H. 100; Rindskoff v. Barrett, 14 Ia. 101; Couch v. Watson Coal Co., 46 Id. 17; Rafert v. Scroggins, 40 Ind. 195; Lamb v. Klaus, 30 Wis. 94; Castleman v. Life Ins. Co., 14 Bush 197; Lowe v. Lehman, 15 Ohio St. 179; Randall v. Smith, 63 Me. 105; Isaksson v. Williams, 26 Fed. Rep. 642, 645. A widespread and established use has at least a tendency to show knowledge. Croucher v. Wilder, 98 Mass. 322; Howard v. Great Western Ins. Co., 109 Id. 384; Mooney v. Howard Ins. Co., 138 Id. 375. Parties engaged in a particular business, or persons accustomed to deal with them, may be presumed to have knowledge of the uniform course of such business. Hence its usages, in the absence of agreement to the contrary, may be supposed to have entered into the contract in relation to such business. Morning Star v. Cunningham, 110 Ind. 328, 335; Florence Machine Co. v. Daggett, 135 Mass. 582; Talcott v. Smith, 142 Id. 542, 544; Rogers v. Holden, Id. 196; Fitzsimmons v. Academy, 81 Mo. 37; East Tennessee R. R. Co. v. Johnston, 75 Ala. 596; Carter v. Coal Co., 77 Pa. St. 286; Lyon v. George, 44 Ind. 301. Generally in case of local customs actual knowledge must be brought home to a party in order to bind him. Scott v. Meier, 53 Mich. 554; Flatt v. Osborne, 33 Minn. 98; Thompson v. Minneapolis R. R. Co., 35 Id. 428; Gregg v. Garverick, 33 Kans. 190, 193; Walsh v. Frank, 19 Ark. 270; Marlett v. Clary, 20 Ark. 251; Collins v. New England Iron Co., 115 Mass. 23; Sawtelle v. Drew, 122 Id. 228; Stevens v. Reeves, 9 Pick. 197; Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411; Little v. Fargo, 43 Hun 233; Winsor v. Dillaway, 4 Met. 221; Wallace v. Morgan, 23 Ind. 399.

To be valid, a custom must be general, uniform, and certain. Singleton v. Hilliard, 1 Strob. 203, 216; Potts v. Aechternacht, 93 Pa. St. 138; Bissell v. Ryan, 23 Ill. 566, 571; Barton v.

McKelway, 2 Zab. 165, 175; Pevey v. Schulenburg, 33 Minn. 45, 47. The requirement that a usage must be reasonable is imperative. "Perhaps there can be no better evidence of the reasonableness of a custom than its antiquity and uninterrupted prevalence." Baxter v. Rodman, 3 Pick. 435, 439. In the following cases usages were held unreasonable. Mulliner v. Bronson, 14 Bradw. 355; Haskins v. Warren, 115 Mass. 514; St. Andrew v. Mauchaug Mfg Co., 134 Id. 42; Smith v. Wright, 1 Cai. 43; Reed v. Richardson, 98 Mass. 216; Whitney v. Essen, 99 Id. 308; Farnsworth v. Harmer, 1 Allen 494; Commonwealth v. Cooper, 130 Mass. 285; Stoney v. Transportation Co., 17 Hun 579; Wadley v. Davis, 63 Barb. 500; Fuller v. Robinson, 86 N. Y. 306; Lehman v. Marshall, 47 Ala. 362; Bank v. Bank, 51 Md. 128; Mills v. Ashe, 16 Tex. 296; People v. Gold Run, &c., Co., 66 Cal. 138; Strong v. Railroad, 15 Mich. 206; Harrington v. Edwards, 17 Wis. 586; Lord v. Botsford, 26 Fed. Rep. 651; Anewalb v. Hummel, 109 Pa. St. 271. See St. Louis R. R. Co. v. Southern Express Co., 117 U. S.; Liverpool Steam Co. v. Saitter, 17 Fed. Rep. 695; Liverpool Steam Co. v. Saitter, 22 Id. 560; Harlan v. Ely, 68 Cal. 522, 527. It has been held that a usage may be shown that gratuities or "scale moneys" are considered as part of the compensation of hostlers at hotels. Jonsson v. Thompson, 97 N. Y. 642. Evidence of the usage of the shipper to bed the car is admissible to explain the intention of the parties in making a special agreement. East Tenn. R. R. Co. v. Johnston, 75 Ala. 596, 604. See, also, Kinney v. South & North Railroad Co., 82 Id. 368; Stoudenmire v. Harper, 81 Id. 242. Evidence has been admitted of shippers as to the delivery of freight for shipment. Montgomery Railway Co. v. Kolb, 73 Ala. 396. Some late cases in which evidence of usage was admitted are Jones v. Haly, 128 Mass. 585; Florence Machine Co. v. Daggett, 135 Id. 582, 583, and cases cited; McCullough v. Hellweg, 66 Md. 269, 275; Lansing v. Johnson, 18 Nebr. 174; Brown Chemical Co. v. Arkinson, 91 No. Car. 389; Wear v. Sanger, 91 Mo. 348, 356; Scudder v. Ames, 89 Id. 496, 508; Tibby v. Missouri Pacific R. R. Co., 82 Id. 292; Smythe v. Parsons, 37 Kan. 79; Newhall v. Langdon, 39 Ohio St. 87, 95; Steel Works v. Dewey, 37 Id. 242. It has been held in Illinois that it is well known to all dealing in whiskey warehouse receipts, that in purchasing them the warehouse and not the seller is looked

to as the responsible party. Mida v. Geissman, 17 Bradw. 207, 211.

Evidence.— Usage is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusions or inferences as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the character or force of the usage. Neither is it competent for them to testify what is the understanding of others in regard to its effect. The effect is to be determined by the court, or by the jury under its direction. Haskins v. Warren, 115 Mass. 514, 535; Gallup v. Lederer, 1 Hun 282; Southwestern, &c., Co. v. Stanard, 44 Mo. 71; Jewell v. Center & Co., 25 Ala. 498; Gary v. Meagher, 33 Id. 630; Texas Banking Co. v. Hutchins, 53 Tex. 61.

Custom cannot contradict a fact plainly proved by positive testimony. I. & G. N. R'y Co. v. Gilbert, 64 Tex. 536, 541. Evidence of a usage should never be admitted "until the party offering it has distinctly stated to the Court what he intends to prove. Susquehanna Fertilizer Co. v. White, 66 Md. 444, 457. Evidence of the uniform and general custom in like cases is sometimes competent, although not conclusive, upon the question whether a use is a reasonable one. Red River Mills v. Wright, 30 Minn. 249, 254. But the testimony of the same witness as to his conduct and the result of it in other cases is immaterial. Lane v. Boston & Albany Railroad Co., 112 Mass. 455. Lewis v. Smith, 107 Id. 334; City Council v. Montgomery, 79 Ala. 233, 245. Usage is sometimes resorted to to raise a primâ facie presumption of fact in aid of collateral testimony. Knickerbocker Ins. Co. v. Pendleton, 115 U. S. 340.

It has been held that the testimony must be ample to establish a usage. Frith v. Barker, 2 Johns. 327. Some of the authorities hold that a usage cannot be established by the testimony of a single witness. Bissell v. Ryan, 23 Ill. 566, 571; Wood v. Hickok, 2 Wend. 501; Holwerson v. Cole, 1 Spears (S. C.) 321. But the weight of the authority is the other way. Robinson v. U. S., 13 Wall. 363, 366; Marston v. Bank, 10 Ala. 284; Partridge v. Forsyth, 29 Ala. 200. "Notwithstanding the dictum in Boardman v. Spooner, 13 Allen 353, 359, there can be no doubt at the present day that the circumstances

that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact, and does not affect its competency or its sufficiency as matter of law." Jones v. Hoey, 128 Mass. 585; Wootters v. Kauffman, 67 Tex. 488, 493; Vail v. Rice, 5 N. Y. 156. See Treadway v. Shannon, 7 Nev. 37. Testimony that one knew what had been the custom for several years is insufficient. Smith v. Rice, 56 Ala. 417. Usages must be pleaded. Liggatt v. Withers, 5 Gratt. 24; Sullivan v. House, 2 Col. 424; Lewis v. McClure, 8 Oreg. 273; Overman v. Bank, 31 N. J. (Law) 563.

In regard to the burden of proof the general rule of course is that he who sets up anything must prove it, although, as we have already seen, it is sufficient in most cases if it is shown that the usage was presumptively known to both parties. See Loveland v. Burke, 120 Mass. 139; Harris v. Turnbridge, 83 N. Y. 92; Scott v. Whitney, 41 Wis. 504; Power v. Kane, 5 Id. 265; Irish v. Railroad, 19 Minn. 376; N. Y. Iron Mine v. Bank, 44 Mich. 344; Bentley v. Daggett, 51 Wis. 224; Murray v. Spencer, 24 Md. 520; Fisher v. Sargent, 10 Cush. 250; Fletcher v. Seekell, 1 R. I. 267. Sometimes the violation of a usage is evidence of negligence. Sampson v. Hand, 6 Whart. 311, 324. See also Cook v. Champlain Co., 1 Den. 92, 102; Bradford v. Drew, 5 Met. 88; Maxwell v. Eason, 1 Stew. & P. 514; Chenowith v. Dickenson, 8 B. Mon. 156; Barber v. Brace, 3 Conn. 9. But generally custom cannot be set up to show that negligence does or does not exist; it must be determined by the facts of the case. G. C. & Santa Fé R'y Co. v. Evanrich, 61 Tex. 36. Established usage not to tranship is not rebutted by bill of lading reserving right of transshipment. Schroeder v. Schroelzer, 66 Cal. 294, 298.

Court and the jury. — The question of the existence of a usage is for the jury; of its validity, for the Court. Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 344, 345; Huston v. Peters, 1 Met. (Ky.) 558; Chicago Packing Co. v. Tilton, 87 Ill. 547; Steele v. McTyer, 31 Ala. 667; Sullivan v. Jernigan, 21 Flor. 264, 278; Elder v. Railroad Co., 13 S. C. 279. "There does not seem to be entire harmony in the decisions of other states as to whether the reasonableness of a custom is to be determined by the Court, or whether it is a question for the jury." Mulliner v. Bronson, 14 Bradw. 355, 364.

Private usage. — The practice and usage of a party has effect if expressly made part of the terms of the contract or if shown to have been known to the other party and assented to by him. Hursh v. North, 40 Pa. St. 241; Railroad Co. v. Nash, 43 Ind. 423; Marshall v. Express Co., 7 Miss. 1; Hooper v. Railroad, 27 Id. 81; Boody v. Stone, 24 Vt. 660; Stevens v. Smith, 21 Id. 90; Bank v. Wallace, 13 S. C. 347; Silk Co. v. Fair, 112 Mass. 354; Veiths v. Hagge, 8 Ia. 163; Railroad v. Murray, 72 Ill. 128. But generally mere personal modes of dealing cannot be set up as customs. Powell v. Thompson, 80 Ala. 51, 55; Burr v. Sickles, 17 Ark. 428, 434. The practice of a local office of a telegraph company cannot vary the terms of the contract under which the message is sent. Grinnell v. W. U. Tel. Co., 113 Mass. 299. See furthur Eureka Ins. Co. v. Robinson, 26 Pa. St. 256, 265; Meighen v. Bank, 25 Id. 288; Burger v. Mutual Ins. Co., 71 Id. 422, Vaughan v. Railroad, 63 N. C. 11; Loring v. Gurney, 5 Pick. 16; McDowell v. Ingersoll, 5 S. & R. 101; Knox v. Rives, 14 Ala. 249, 257. As to the authority of an assistant teller to certify checks, see Hill v. Nation Trust Co., 108 Pa. St. 1.

Various points. — The custom in Wigglesworth v. Dallison is recognized in Pennsylvania. Forsythe v. Price, 8 Watts 282, and cases cited; Denis v. Rossler, 1 P. & W. 224; Iddings v. Nagle, 2 W. & S. 22. Also in other states. Nellons v. Truax, 6 Ohio St. 97; Van Dorens v. Everitt, 2 South 460; Dorsey v. Eagle, 7 Gill 321. As to wheat but not as to oats in Delaware, Templeman v. Biddle, 1 Harr. 522. As to Virginia, see Harris v. Carson, 7 Leigh 632, 639. As to usages and customs in Louisiana before acquisition, see Slidell v. Grandgian, 111 U. S. 412.

The usage, as has been previously stated, must be shown to be well established, uniform, general and notorious. The evidence therefore must show a series of similar transactions. A single instance will not suffice. Berkshire Woolen Co. v. Proctor, 7 Cush. 422; Dean v. Swoop, 2 Binney 72; Cope v. Dodd, 13 Penn. St. 37. In Indiana it is held requisite that the custom be shown to prevail all over the state regarded as a single locality. Harper v. Pound, 10 Ind. 32; Rafert v. Scroggins, 40 Id. 195; Spears v. Ward, 48 Id. 541. And the testimony to prove the usage must be positive and certain. It is therefore improper to admit evidence that it was not the custom to

make certain contracts at a certain place. Goodfellow v. Meegan, 32 Mo. 280. And if the latest knowledge of the witness was acquired more than a year prior to the transaction in question, his testimony should be excluded. Hale v. Gibbs, 43 Iowa, 380. Contracting parties are not bound by local usages of other places unless they are referred to or made a part of the contract. Cobb v. Limerock, &c., Ins. Co., 58 Me. 326; Union Bank v. Union Ins. Co., Dudley (S. C.) 171. Nor will it be permitted to import by implication a local usage of one place into a contract made at another. Parkhurst v. Gloucester Ins. Co., 100 Mass. 301; Cobb v. Limerock, &c., Ins. Co., 58 Me. 326; Strong v. King, 35 Ill. 9; Nichols v. DeWolf, 1 R. I. 277. And if a usage which the courts would not enforce, such as a sale of a customer's stock without notice to him upon his failure to furnish sufficient margin at the stock exchange, be agreed to in writing by the customer, it will be upheld as to him. Baker v. Drake, 66 N. Y. 518.

MOSS v. GALLIMORE AND ANOTHER.

MICHAELMAS. - 20 GEO. 3.

[REPORTED DOUGL. 279.]

A mortgagee, after giving notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.

In a notice for the sale of a distress, it need not be mentioned when the rent fell due (a).

In an action of trespass, which was tried before Nares, Justice, at the last assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows: One Harrison being seized in fee, on the first of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of 40%, payable yearly on the 12th of May; and in May, 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor all but 281. which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3rd of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the

notice of distress, Crowther v. Ramsbottom, 7 T. R. 654, per Lord Kenyon,

⁽a) A man is not bound by his [Phillips v. Whitsed, 2 E. & E. 804.] A notice of distress must be in writing, Wilson v. Nightingale, 8 Q. B. 1034.

rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz., on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c., by virtue of an authority, &c., for the sum of 281., being rent, and arrears of rent, due to the said Esther Gallimore, at Michaelmas last past, for, &c., and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of 22l. 2s. The question stated for the opinion of the court was, whether, under all the circumstances, the distress could be justified?

Wood for the plaintiff. Bower for the defendants.

Wood. — The plaintiff's case rests upon two grounds: 1st, The defendant, Gallimore, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2nd. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due and payable in May. -1. Before the statute of 4 Anne, c. 16 (a), a conveyance by the reversioner was void without the attornment of the tenant (b), which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor (according to a late case (c)), is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing in this case can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force: the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for

⁽a) Sect. 9.

⁽c) Keech v. Hall, M. 19, Geo. 3,

⁽b) Co. Litt. 309, a. b.

ante, p. 546.

the rent as well as Gallimore, and how could be take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear from the case, that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of William and Mary (a); but it is thereby required that notice shall be given thereof, "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 Geo. 2 (b), does not make the defendants trespassers ab initio, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity (c).

Lord Mansfield observed, that the defendant was precluded by the case from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable; and Buller, Justice, said that it was not necessary, by the statute of William and Mary, to set forth in the notice at what time the rent became due.

Bower. — If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses; Long v. Hemming (d). Now, however, any doubts there might have been on this subject are entirely removed by the statute of Queen Anne, the words of which are very explicit, viz. (e): "that all grants or conveyances

⁽a) 2 W. & M. Sess. 1, c. 5, s. 2.

⁽b) Cap. 19, s. 19.

⁽c) See on this point, ante [in note to Six Carpenters' case].

^{· (}d) 1 Anders. 256. Vide S. C. Cro. El. 209.

⁽e) 4 Anne, cap. 16, s. 9.

of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made." The proviso in the same statute (a), which says, that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shows, that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgager is called a tenant at will to the mort-That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage (b). The interest, it is said, is not stated to have been demanded: but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said the tenant could not decide between the mortgagor (or, which is the same thing, his assignees) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The Court told him it was unnecessary for him to say anything on the other point.

Lord Mansfield.— I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee when the tenant colludes with the mortgagor; for the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent

no longer exists. See note to Keech v. Hall, ante.

⁽a) Sect. 10.

⁽b) White v. Hawkins, M. 19 Geo.

^{3.} This practice was anomalous, and

to be paid to him, and not the mortgagor (a). This, however, is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; but there is a provision, that the tenant shall not be prejudiced for any act done by him as holding under the grantor, till he has had notice of the deed. Therefore, the payment of rent before such notice is good. With this protection, he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions, it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only quodam modo. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant in the present case cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

⁽a) But this is at present never permitted. See ante, note to Keech v. Hall.

Ashurst, Justice. — The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

Buller, Justice.— There is in this case a plea of the general issue, which is given by statute (a), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded; but since that statute it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of Krech v. Hall, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. Expressions used in particular cases are to be understood with relation to the subjectmatter then before the court.

The postea to be delivered to the defendants.

Moss v. Gallimore is the leading case upon a point which seems so clear in principle that, were it not for its very general importance, it would be perhaps a matter of some surprise that any case should have been requisite to establish it. The mortgager having conveyed his estate to the mortgagee, the tenants of the former become of course the tenants of the latter; the necessity of their attornment being done away with by the statute of Anne, which, though it provides that they shall not be prejudiced by the abolition of attornment, and consequently renders valid any payments they may have made to the mortgager without notice of the mortgage [provided that such payments were made in respect of rent which was due at the time of payment or became due before notice of the mortgage: De Nicholls v. Saunders,

L. R. 5 C. P. 589, 39 L. J. C. P. 297; Cook v. Guerra, L. R. 7 C. P. 132, 41 L. J. C. P. 89], nevertheless places the mortgagee in the situation of the mortgagor, immediately upon the execution of the mortgage-deed, subject only to that proviso in favour of the tenants; and enables him by giving notice to them of the conveyance, to place himself to every intent in the same situation towards them as the mortgagor previously occupied: Rawson v. Eicke, 7 A. & E. 451; Burrowes v. Gradin, 1 Dowl. & L. 213.

Such being the situation of the tenant with respect to the mortgagee, it would of course be unfair that he should not be proportionably exonerated from his liabilities to the mortgagor; therefore, where a lessor, after the execution of the lease, mortgaged the premises, it was held that he could not afterwards maintain ejectment for a forfeiture: Doe dem. Marriott v. Edwards, 5 B. & Ad. 1065. [As to what is notice of the mortgage, see Cook v. Guerra, ubi. sup.]

In Trent v. Hunt, 9 Exch. 14, it is said to have been decided by the Court of Exchequer, that if a lessor having mortgaged his reversion is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is presumptione juris authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. [In Snell v. Finch, 13 C. B. N. S. 651, Trent v. Hunt was acted upon, the court suggesting that the implied authority may be limited to a distress on a lawful occasion. See also the judgments of Williams and Willes, JJ., in The Dean, &c., of Christchurch v. The Duke of Buckingham, 17 C. B. N. S. 391, 33 L. J. C. P. 322.]

Such being the situation of a tenant who comes in under the mortgagor before the mortgage, let us now examine a subject which seems to involve more difficulty, namely, that of a tenant who has entered under the mortgagor subsequently to the mortgage.

[And first it must be observed, that as regards mortgages made since the 1st January, 1882, the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, has introduced a material difference, for by that Act, unless otherwise provided by such mortgage, a statutory power of leasing is given to a mortgagor or mortgage while respectively in possession. In this note there will be considered the situation of a mortgagor's tenant under a tenancy posterior to the mortgage,

1st. Where the lease is not made under the statutory power.

2nd. Where it is so made.

And, first, at common law,] it was once alleged that though a tenant who had entered previous to the mortgage became the tenant of the mortgagee after the mortgage, and might, if any proceedings were afterwards instituted against him by the mortgagor, show that, although that person was once his landlord, he had now conveyed away his estate in the premises; (according to the ordinary rule of law, that a tenant, though he cannot dispute the title of the landlord under whom he entered, may confess and avoid it by showing that it has now determined: see *Doe* dem. *Marriott v. Edwards*, above cited;) still that a tenant who had entered since the mortgage was differently situated, for that he was estopped from disputing the title of the mortgagor, and could not confess and avoid it, inasmuch as it had never really existed during the period of his possession; and this idea derived a good deal of countenance from the decision of the Court of Common Pleas, *Alchorne v. Gomme*, 2 Bing. 54.

However, the subject was afterwards fully discussed in Pope v. Biggs, 9 B.

& C. 245, [and in that case, followed in Waddilove v. Barnett, 4 Dowl. 348, it was held that a] "mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents." "The mortgagor," said Parke, J., "may be considered as acting in the nature of a bailiff or agent for the mortgagee. His receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into in his own name with the tenants. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already due or no." [Accord, Vallance v. Savage, 7 Bing. 595 (a case of trustee and cestui que trust);] Megginson v. Harper, 4 Tyrwh. 100; Burrowes v. Gradin, 1 Dowl. & L. 213, Wightman, J.

The doctrine thus promulgated in Pope v. Biggs was, however, shaken by Partington v. Woodcock, 6 A. & E. 690, and Rogers v. Humphreys, A. & E. 313. And at length, in Evans v. Elliott, 9 A. & E. 342, it was expressly decided by the Court of Queen's Bench [on a question whether the mortgagee had a right to distrain,] that the mortgagee cannot by the mere fact of giving the mortgagor's tenant a notice, cause him to hold of himself the mortgagee, and that even a subsequent attornment by the tenant to the mortgagee will not have the effect of setting up his title as landlord by relation.

The result of this decision and of that of the Court of C. P. in Brown v. Storey, 1 Scott, N. C. 91; 1 M. & G. 117, seems to be that [at common law] in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence which proves its existence, but that it does not lie in the power of the mortgagee by a mere notice to cause the tenant in possession to hold under him on the same terms on which he held under the mortgagor — or indeed upon any terms at all without his own consent. And that where the tenant does consent to hold under the mortgagee, a new tenancy is created, not a continuation of the old one between him and the mortgagor. [See the judgment in Waddilove v. Barnett, 2 Bing. N. C. 538.] In Brown v. Storey, indeed, the Court of Common Pleas expressed an opinion that, if the mortgagor's tenant, after receiving notice from the mortgagee to pay rent to him, continued in possession, it might fairly be inferred that he assented to continue as tenant to the mortgagee upon the old terms.

In Burrows v. Gradin, 1 Dowl. & L. 213 (which may be considered a middle case), Wightman, J., held that an agreement [made after the mortgage] between the mortgager and a tenant from year to year, whose tenancy commenced before the mortgage, for payment of an additional annual sum as rent, in consideration of improvements made by the mortgagor, had not the effect of so changing the situation of the parties, that the tenant could be considered as no longer holding of the mortgagee; and further, that the mortgagee might adopt the dealing of the mortgagor as his agent, and (after notice of the mortgage) recover not merely the amount of rent originally payable, but the additional sum also, which, in consequence of the improvement of the land, the tenant agreed to pay; a remarkable decision, so far as relates to the additional sum agreed to be paid, because it appears from Donellan v. Read, 3 B. & Ad. 899, and Lambert v. Norris, 2 M. & W. 334, that that sum was not rent properly so called, but a sum in gross, for which an assignee of the reversion could not sue, nor could an assignee of the term be

sued. The reasoning of Wightman, J., though expressly limited to the peculiar circumstances of the case, and especially founded on that of the tenancy having existed at the time of the mortgage, tends in some degree to confirm the conclusions drawn from *Pope* v. *Biggs*.

It should seem that the cases on this subject might be reconciled to ordinary principles, without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may [at common law] in case of an eviction by the mortgagee, either actual or constructive, (for instance, an attornment to him under threat of eviction, see Doe d. Higginbotham v. Barton, 11 A. & E. 314; Mayor of Poole v. Whitt, 15 M. & W. 571; and the judgments in Delaney v. Fox, 2 C. B. N. S. 768, and Carpenter v. Parker, 3 C. B. N. S. 237, 27 L. J. C. P. 78],) dispute the mortgagor's title to either the land or the rent, (which is no more than any tenant may do upon an eviction by title paramount;) and further, that he may, although there have been no eviction, defend an action for rent by proof of a payment under constraint, in discharge of the mortgagee's claim, Johnson v. Jones, 9 A. & E. 809, (which right is analogous to that of an ordinary tenant in respect of payments on account of rent-charges, and other claims issuing out of the land, of which examples are cited in the note to Lampleigh v. Braithwaite, ante;) so that [such] a tenant who has come in under the mortgagor after the mortgage, and has neither paid the rent to the mortgagee, nor been evicted by him either actually or constructively before the day of payment, cannot defend an action by the mortgagor for that rent: Wheeler v. Branscombe, 5 Q. B. 373.

As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, [and the tenant's paying them to him,] it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after the notice, or for rent which accrued due before the notice, but was unpaid at the time when the notice was given. In the former case the defence amounts to a denial of the contract alleged, which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, viz, where the rent became due before notice, but was unpaid at the time of notice, the tenant confesses that the right of action once existed, but avoids it by matter ex post facto, viz, by the subsequent notice from the mortgagee, Waddilove v. Barnett, 4 Dowl. P. C. 347; 2 Bing. N. C. 538.

[It appears to be now settled that at common law the mere notice without payment or eviction is not a defence to an action by the mortgagor against the tenant, either for rent due before (Wilton v. Dunn, 17 Q. B. 294; Hickman v. Machin, 4 H. & N. 716), or after the notice (Hickman v. Machin).

Secondly, there remains to be considered the situation, relatively to the mortgagee, of the mortgagor's tenant where the lease has been made by the mortgagor under the statutory power given by s. 18 of the Conveyancing Act, 1881. It is by that section enacted, with reference to mortgages made after 1 Jan. 1882, that "a mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in that section described and authorised." The remainder of the section will be found set out in the note to Keech v. Hall, ante, p. 549. Further, s. 10 of the same Act is as follows:—"Rent reserved by a lease and the benefit of every covenant or provision therein contained having reference to the

subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased." Sect. 11 provides that the obligation of the lessor's covenants shall likewise run with the reversion so far as the lessor has power to bind the person entitled to the reversion.

These sections apply only to leases made after the commencement of the Act in the case of leases of the kind now under consideration. The object aimed at by the above sections would seem to be to provide that while on the one hand a lease by a mortgagor in possession is to be valid against and binding on the mortgagee, on the other hand, the mortgagee, at any rate on giving notice or going into possession, is at once to have under such lease every right which he would have had if he himself had been the lessor. The wording of the sections, however, is somewhat obscure, and it would be premature to express an opinion whether their combined effect is as above suggested.

It should be observed that the power given by s. 18 may be excluded, modified, or enlarged by the express terms of the instrument itself.

The Judicature Act, 1873, provides, s. 25, sub-s. 5, that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall be given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."]

I' will conclude this note by taking notice of a case which sometimes occurs; viz., that of a lease purporting to be by mortgager and mortgagee jointly: such an instrument operates as a lease by the mortgagee, with a confirmation by the mortgager, until the estate of the former has been determined by paying off the mortgage-money, and then it becomes the lease of the mortgager, and the confirmation of the mortgagee, and it follow[ed] that, if [before the Common Law Procedure Act, 1852] ejectment was brought against the tenant during the mortgagee's estate, the demise must have been laid in the name of the mortgagee; if afterwards, in that of the mortgagor; but a joint demise laid in the declaration would not have been improper: Doe dem. Barney v. Adams, 2 Tyrwh. 289. See Doe dem. Barker v. Goldsmith, Ibid. 710.

[A right of entry reserved to the mortgagor only in a lease by mortgagor and mortgagee was (before the Conveyancing Act, 1881) held not to be available to the plaintiffs in ejectment by the mortgagor and mortgagee: Saunders v. Merryweather, 3 H. & C. 902, 35 L. J. Exch. 115. The mortgagee could not re-enter, because no right of re-entry was reserved to him; the mortgagor could not, because he had no legal interest in the reversion, and the facts of the case excluded an estoppel.]

When a mortgagor and mortgagee join in a lease, and the covenants to pay

rent and repair are with the mortgagor and his assigns only, the [assignee of the] mortgagee cannot [unless by virtue of the Conveyancing Act. 1881] sue on those covenants, because collateral to his interest in the land: Webb v. Russell, 3 T. R. 393; though the mortgagor might sue on them as covenants in gross: Stokes v. Russell, 3 T. R. 678, 1 H. Bl. 562. Where the mortgagor and mortgagee join in a lease, containing an express covenant by the mortgagor for quiet enjoyment, no covenant from both can be implied, Smith v. Pilkington, 1 Tyrwh. 313. In Harold v. Whitaker, 11 Q. B. 147, 163, in a lease by the mortgagor and mortgagee which recited the mortgage, the reddendum was to the mortgagee, his executors, &c., during the continuance of the mortgage, and after payment and satisfaction thereof, to the mortgagor or his executors, &c., and the lessee covenanted to and with the mortgagee, and also to and with the mortgagor, to pay the rent "on the several days and times, and in manner as the same was reserved and made payable." The covenant was holden to be several.

Position of a tenant under a lease made by a mortgagor in reference to the payment of rent:—

(I) Where the lease is prior to the mortgage. — The mortgagee, merely upon giving notice to the tenant in possession, is entitled to receive all rent accruing and becoming due subsequently to the execution of the mortgage, including whatever is in arrear at the time of giving notice as well as that which accrues and becomes due afterwards. Russell v. Allen, 2 Allen 42; Mirick v. Hoppin, 118 Mass. 582; King v. Housatonie R. R. Co., 45 Conn. 226, 4 Kent's Com. (6th ed.) 165, Washburn Real Property 531 (although in Pennsylvania, Myers v. White, 1 Rawle 353 at 355, it was said the mortgagee could not compel the tenant to pay the rent to him, whether the lease was executed before or after the mortgage). If, however, the possession is reserved to the mortgagor until breach, the mortgagee is not entitled to receive the rent until default, and after giving notice of his claim and requiring payment to himself; Taylor's Landlord and Tenant § 121 (8th ed.). The mortgagee is not entitled to the rent which became due before the execution of the mortgage; Burden v. Thayer, 3 Metc. 76; King v. Housatonic R. R. Co., ubi supra. Payment of rent to the mortgagor before notice from the mortgagee is a good defence to an action for the rent by the mortgagee; Russell v. Allen, ubi supra; Fitchburg Corp. v. Melven, 15 Mass. 268. If, however, the mortgagee, before or at the time rent becomes due, notify the tenant to pay the rent to him, the tenant cannot defend by proving previous payment to the mortgagor; De Nicholls v.

Saunders, L. R. 5 C. P. 589; Cook v. Guerra, L. R. 7 C. P. 132. Attornment by the tenant to the mortgagee is not necessary to enable the latter to maintain an action for rent; Burden v. Thayer, ubi supra.

(II) Where the lease is subsequent to the mortgage and made by a mortgagor while remaining in possession of the mortgaged estate. - At common law the mortgagee has a right to the immediate possession of the mortgaged estate; Colman v. Packard, 16 Mass. 39; Rockwell v. Bradley, 2 Conn. 1; Blaney v. Bearce, 2 Greenl. 132. The mortgagee cannot compel the tenant, there being no privity of contract or estate between them, to pay the rent to himself; McKircher v. Hawley, 16 Johns. 289; Rogers v. Humphreys, 4 Ad. & El. 299 at 313; thus, the mortgagee cannot by mere notice compel the tenant to pay the rent to himself; Bartlett v. Hitchcock, 10 Bradw. (Ill.) 871; Evans v. Elliott, 9 Ad. & El. 342; Drakford v. Turk, 75 Ala. 339, though formerly held otherwise in Alabama; Hutchinson v. Dearing, 20 Ala. 798; and held otherwise in Maryland to-day; Clark v. Abbott, 1 Md. Ch. 474. On the other hand, the mortgagee may consider the tenant as a trespasser or a disseisor and may maintain ejectment or a writ of entry against him; Fitchburg Corp. v. Melven, ubi supra; Mass. Ins. Co. v. Wilson, 10 Metc. 126. But where the estate remains in the mortgagor until after foreclosure and sale, the mortgagee cannot treat the tenant as a trespasser until that time; Simers v. Saltus, 3 Den. 214 at 219, and though the tenant attorn to the mortgagee before foreclosure and sale, it is no defence to an action by the mortgagor for the rent; Hogsett v. Ellis, 17 Mich. 351. The mortgagee may eject the tenant without notice to quit; Doe v. Mace, 7 Blackf. 2; Rockwell v. Bradley, ubi supra; Steadman v. Gassett, 18 Vt. 346; Bartlett v. Hitchcock, ubi supra; Comer v. Sheehan, 74 Ala. 452. A mortgagor, not having reserved possession to himself until breach, cannot make a lease which will be good against the mortgagee; Keith v. Swan, 11 Mass. 216; Howell v. Schenck, 4 Zab. 89 at 91. Until there has been an actual entry by the mortgagee, or some act equivalent thereto has occurred, the mortgagee can maintain no action against the tenant for the recovery of rent, except upon an express promise to pay it; Russell v. Allen, 2 Allen 42 at 44; Long v. Wade, 70 Me. 358; Kimball v. Lockwood, 6 R. I. 138. When the mortgagee has entered and notified the tenant to pay the rent to him, the tenant cannot defend an action for the rent by showing there is a prior mortgage under which no entry has been made; Cavis v. McClary, 5 N. H. 529. Though the entry of the mortgagee be ineffectual for the purpose of foreclosure, yet if notice be given to the tenant, he is entitled to subsequently accruing rents; Cook v. Johnson, 121 Mass. 326. Where the mortgagor owns the estate until the mortgagee enters for breach of condition, the mortgagee cannot, before entry for condition broken, recover rent due from the tenant of the mortgagor; White v. Wear, 4 Mo. Ap. 341. Though the mortgagee cannot compel the lessee to become his tenant, yet on entry or demand the latter may attorn and pay the after-accruing rent to him; Baldwin v. Walker, 21 Conn. 168; Welch v. Adams, 1 Metc. 494; Cook v. Johnson, ubi supra; Kimball v. Lockwood, ubi supra; Cavis v. McClary, ubi supra; but the tenant is not bound to attorn, and may consider himself as evicted; Simers v. Saltus, 3 Den. 214. If, however, the tenant attorns, there will be a new tenancy and no liability upon the old lease; thus in Doe v. Bucknell, 8 C. & P. 566, it was held the lessee became tenant from year to year; and in Illinois, Gartside v. Outley, 58 Ill. 210, where there was no express contract between the mortgagee and the tenant, it was said the latter would become a tenant from year to year. Although there be no liability upon the old lease, yet if the tenant pay the mortgagee the rent due but unpaid before notice, the tenant will have a good defence against the mortgagor; Waddilove v. Barnett, 4 Dowl. P. C. 347; 2 Bing. N. C. 538.

When can the tenant resist an action for the rent by the mortgagor? — (a) When the tenant has been evicted by the mortgagee, or has attorned to him under threat of eviction; Simers v. Saltus, 3 Den. 214 at 216; Jones v. Clark, 20 Johns. 51 at 62; Fitchburg Corp. v. Melven, 15 Mass. 268; Hickman v. Machin, 4 H. & N. 716 at 720. Eviction, however, is a good defence only for the rent that falls due subsequently, but not for that due when eviction took place; Carpenter v. Parker, 3 C. B. (N. S.) 206. (b) When, after notice from the mortgagee, the tenant has paid him not only the rent falling due subsequently to the notice, but also the rent due but unpaid before the notice; Waddilove v. Barnett, 4 Dowling P. C. 347; 2 Bing. N. C. 538. But mere notice from the mortgagee, without eviction or payment, is no defence to an action by the mortgagor against the tenant, either for rent due before or after notice: Wilton v. Dunn, 17 Q. B. 294; Hickman v. Machin, 4 H. & N. 716.

WHITCOMB v. WHITING.

EASTER. - 21 GEORGE 3.

[REPORTED DOUGL. 652.]

The acknowledgment of one out of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and may be given in evidence in a separate action against any of the others. (Secus since the statutes mentioned in the notes.)

Declaration, in the common form, on a promissory note executed by the defendant. Pleas: the general issue, and non assumpsit infra sex annos. Replication: assumpsit infra sex annos. The cause was tried before Hotham, Baron, at the last assizes for Hampshire. The plaintiff produced a joint and several note executed by the defendant and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principle, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to show cause why there should not be a new trial on the motion of Lawrence, who cited Bland v. Haslerig (a); and this day in support of the application, he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of Heylin v. Hastings (b), reported in

Salkeld (a), and 12 Modern (b); and in Hemmings v. Robinson (c), it was decided, that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a mesne indorser that the indorsement on the back of the note was in his handwriting; but the court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion, if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord Mansfield.—The question here, is only whether the action is barred by the Statute of Limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

Willes, Justice. — The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

Ashurst and Buller, Justices, of the same opinion.

The rule discharged (d).

[The decision in the principal case as to the effect of acknowledgment or payment by a joint contractor as regards the Statute of Limitations has been reversed by 9 Geo. 4, c. 14, sects. 1 and 2 (commonly called Lord Tenterden's Act), supplemented by sect. 14 of "The Mercantile Law Amendment Act,

defendant, who was found to have promised within the six years. That case may be explained on the manner of the finding; for as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove. But according to the principle in the case of Whitcomb v. Whiting, the jury ought to have considered the promise of one as the promise of all, and therefore should have found a general verdict against all.

⁽a) 1 Salk. 29.

⁽b) 223.

⁽c) C. B. M. 6 Geo. 2; Barnes 4to ed. 436.

⁽d) The case of Haslerig v. Bland, cited [in the preceding page], was a joint action against four; the plea, the Statute of Limitations; and a verdict, that one of the defendants did assume within six years, and that the others did not; and it was held by Pollerfen, C. J., Powel, and Rokeby (against Ventris), that the plaintiff could not have judgment against the

1856" (19 & 20 Vict. c. 98), as to which section see Cockrill v. Sparkes, 1 H. & C. 699. These enactments have thus rendered comparatively useless, and therefore caused the omission here of a considerable portion of the notes formerly appended to this case. The remainder of the notes has not lost its utility, as it relates chiefly to the question, what proof of payment suffices, as against the person actually paying, to save the Statute of Limitations, having regard to the provisions of sect. 1 of Lord Tenterden's Act. That section enacts that, "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments" (subintell. Statutes of Limitation), "or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby, provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."]

Where one of two joint drawers of a bill of exchange became bankrupt, and the holder of the bill proved, not upon the bill, but for goods sold, exhibiting the bill as a security, it was held that receipt of dividends on that proof would not take the case out of the Statute of Limitations, as against the other drawer: Brandram v. Wharton, 1 B. & A. 463. In that case the dividend was paid upon the debt proved, and its payment could not, without straining the facts, be treated as a payment on account of the bill; but in general, where there are several securities for a debt, a general payment on account revives them all; thus where a promissory note was made by a surety as security for part of the amount of a mortgage, payment of interest on the mortgage was held enough to take the note out of the operation of the statute: Dowling v. Ford, 11 M. & W. 329.

A payment by the assignee of an insolvent joint maker [was held to be insufficient, even before the Mercantile Law Amendment Act, 1856, to take the case out of the statute either as against the insolvent or the other makers], Davis v. Edwards, 7 Exch. 22. [See also ex parte Topping, 34 L. J. Bankr. 44.]

Where parish officers borrowed money, and gave a promissory note to secure it, signed A. B. &c., church wardens, C. D. &c., overseers, "or others for the time being," it was held that this form of signature was evidence of an authority to the succeeding officers to pay on account, so as to keep the note alive. Jones v. Hughes, 5 Exch. 104; [see 22 & 23 Vict. c. 49, ss. 1 and 4.] In Neve v. Hollands and Wife [18 Q. B. 262], 21 L. J. 289, payment by a wife, without authority of her husband, on account of a note made by them jointly before marriage, was held insufficient to keep it alive as against him and her.

With respect to the mode of proving a payment [to take the case out of the Statute of Limitations], it has been held that if goods be given and accepted in part payment within six years, that [saves] the case [from] the statute, Hooper v. Stephens, 4 A. & E. 71; Hart v. Nash, 2 C. M. & R. 337. But an open account between two tradesmen, each charging the other with goods, though containing items within six years, has not, without an appropriation of the charges on one side in liquidation of those on the other, the effect of avoiding the bar; for the exception in 9 G. 4 is in favour of payments only: Cottam v. Partridge, 4 M. & Gr. 271, 4 Scott, N. R. 819, S. C.;

Clarke v. Alexander, 8 Scott, N. R. 147; Foster v. Dawber, 6 Exch. 839. Where, however, there is such an appropriation by going through the account and striking a balance, with an agreement express or implied that the balance only shall be paid, such a transaction is equivalent to a payment of the lesser debt and a repayment of the amount in liquidation of so much of the greater debt; and so it operates to save the balance of the larger debt from the effect of the statute: Ashby v. James, 11 M. & W. 542, per Alderson, B.; Scholey v. Watton, 12 M. & W. 510, per Parke, B. [Roberts v. Shaw, 4 B. & S. 44, 32 L. J. Q. B. 308.]

A payment on account of the creditor in part liquidation of the debt has of course the same effect as a payment to himself: Hart v. Stephens, 6 Q. B. 937; Worthington v. Grimsditch, 7 Q. B. 479; see Clarke v. Hooper, 10 Bing. 450. In Bodger v. Arch, 10 Exch. 333, the maintenance of a child agreed to be taken in satisfaction of interest, was held to be a payment and to take the case out of the statute. [In Amos v. Smith, 1 H. & C. 238, the trustees under a marriage settlement lent the husband at interest, on the security of his and A.'s bond conditioned for payment of interest, some of the trust money settled to the separate use of the wife. No interest was paid, but the wife gave the trustees receipts for it under an arrangement that it should be considered as paid, and it was held that the transaction amounted to a payment or satisfaction so as to take the case out of the statute. So also Maher v. Maber, L. R. 2 Ex. 153; 36 L. J. Ex. 70.]

Stat. 9 G. 4, cap. 14, also enacts, [s. 3,] "that no indorsement or memorandum of any payment made upon any bill of exchange, promissory note, or other writing, (that is, other writing constituting the contract according to the dictum of Cresswell, J., in Bradley v. James, 13 C. B. 822, where it was held that the statute does not exclude such a memorandum altogether, but only makes it insufficient of itself), by, or in behalf of, the person to whom such payment is made, shall be deemed sufficient proof of payment to take the case out of the operation of the Statutes of Limitation;" and, that part payment may have that effect, it must be observed, that there are two requisites besides proof of the naked fact of payment: - 1st, it must appear that the payment was made on account of a larger debt; 2ndly, that that debt is the one sued for: Tippetts v. Heane, 4 Tyrwh. 775. See the judgment of Parke, B., there, and see Holme v. Green, 1 Stark. 488. In Evans v. Davis, 4 A. & E. 840; Worthington v. Grimsditch, supra; Burn v. Boulton, 2 C. B. 476; [Collinson v. Margesson, 27 L. J. Exch. 305; and Goodwin v. Parton, 41 L. T. N. S. 568, the evidence was held sufficient for that purpose. In Waugh v. Cape, 6 M. & W. 829, the evidence was held insufficient. See further Mills v. Fowkes, 5 Bing. N. C. 455; Moore v. Strong, 1 Bing. N. C. 442.

The first requisite above mentioned involves this also, that the payment be made under the circumstances which do not rebut the implication of a promise to pay the balance; because it is only as giving rise to such an implication, and not by any specific effect of its own, that a payment operates: Wainman v. Kinman, Y Exch. 118 [and see Rigg v. Moggridge, 2 H. & N. 567; Morgan v. Rowlands, L. R. 7 Q. B. 493, 41 L. J. Q. B. 187]; yet see Goddard v. Ingram, 3 Q. B. 839; [Ex parte Topping, 34 L. J. Bankr. 44,] for which reason the payment must also be before action brought: Bateman v. Pindar, 3 Q. B. 574, overruling Yea v. Fouraker, 2 Burr. 1099.

The second requisite mentioned above has led to a discussion whether, where there are two clear and undisputed debts, either can be taken out of the statute by evidence of a part payment not specifically appropriated by the

debtor; upon which question the Court of Common Pleas is said to have incidentally expressed an opinion in the negative: Burn v. Boulton, 2 C. B. 476; but, it [has since been held] to be [in general] a proper question for the jury, whether the payment was made generally on account of whatever might be due from the debtor at the time, and if so both the debts would be saved. [Walker v. Butler, 6 E. & B. 506; and see Collinson v. Margesson, 27 L. J. Exch. 305, per Martin, B.] In Mills v. Fowkes, 5 Bing. N. C. 455, it was held that though a creditor has a right to appropriate a payment made generally to an item barred by the Statute of Limitations, still such payment is not a payment on account so as to take the remainder of the demand out of the statute. Accord, Waller v. Lacy, 1 Sc. N. R. 186; 1 M. & Gr. 54, S. C.; [Nash v. Hodgson, 1 Kay, 650; S. C. on appeal, 6 De G. M. & G. 474, per Knight-Bruce, L. J.; contra Turner, L. J.

In that case the defendant being indebted to the plaintiff on three promissory notes, one of which was for 200l., on application by the plaintiff for payment of interest, paid him 5l. on account generally. At the time of the payment the 2007, note was the only one of the notes which was not barred by the statute, and the plaintiff appropriated the 5l. to payment of interest on that note; and upon the question whether the payment took that note out of the statute, the Court of Appeal was agreed that it did; but the judgment of Knight-Bruce, L. J., proceeded upon the ground of the appropriation. The Lord Chancellor (Cranworth) said, "The cases show that a simple payment of money does not take a debt out of the statute, and that the payment must be of a smaller sum on account of a larger. What I deduce from them is, that where a payment is made as principal, the effect of it will be to take out of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items, some of which are barred, and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. It appears to me that in this case, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and if this were not so, the only effect would be to treat it as a payment on account of all, so that in either case the 2001. note would be kept alive."]

In Willis v. Newham, 3 Y. & J. 518, the Court of Exchequer held, that a verbal acknowledgment of part payment of a debt was not sufficient proof thereof within this statute; the import of which they construed to be, that in no case should a mere verbal acknowledgment take a case out of the Statute of Limitations, whether that acknowledgment were of the existence of the debt, or of the fact of payment. Vide Trentham v. Deverill, 3 Bing. N. C. 397. The authority of Willis v. Newham was, however, repeatedly questioned, though it was acted upon in Bayley v. Ashton, 12 A. & E. 493; 4 P. & D. 204, S. C.; Maghee v. O'Neil, 7 M. & W. 531; Eastwood v. Savile, 9 M. & W. 615; Clarke v. Alexander, 8 Scott, N. R. 147, and the case has been at length overruled in Cleave v. Jones, 6 Exch. 573, where the demand was upon a promissory note for 350l. and interest, and the Statute of Limitations was saved by evidence of an unsigned entry in the defendant's book in her handwriting "1843, Cleave's interest on 350l.—7l. 10s." [And see Edwards v. Jones, 1 Kay & J. 534. In Newbould v. Smith, 29 Ch. D. 882, an entry by

the deceased *creditor* in his diary, "Smith, C. E., eash on account of rent and interest 50%," was held inadmissible in evidence on behalf of the creditor as an admission that interest had been paid, so as to revive the right barred under the Statutes of Limitations to bring a foreclosure action.]

It was held, even before Cleave v. Jones, that written and signed evidence of appropriation may be confirmed by parol, Bevan v. Gething, 3 Q. B. 740; and that if the payment be proved as a fact, the appropriation of that payment to the debt which it is sought to take out of the Statute of Limitations may be proved by an admission, Waters v. Tomkins, 2 C. M. & R. 726. That action was brought to recover the amount of five notes, one for 100l., two for 50l., and two for 20l. each; the evidence upon an issue joined on plea of actio non accrevit infra sex annos was, that within six years the maker, the defendant, on application to him, said, his wife would have called on the holder and paid money on account of the interest on 2001., but for their child's illness; about a fortnight after which, the wife called, and paid 15s., without saying on what account; on another occasion the defendant sent word to the testator that his wife was in Wales, or would have called with the interest; and that the wife on other occasions made payments to the testator, who said, at the time, he should be glad if the interest were more regularly paid. This evidence was held to warrant the jury in finding a verdict for the plaintiff. See, too, Bevan v. Gething, 3 Q. B. 740, where, however, Coleridge, J., expressed a doubt as to the correctness in principle of Waters v. Tomkins. Nor need the writing which is relied on for the purpose of taking a debt out of the operation of the statute specify its amount; that may be proved by parol: Bird v. Gammon, 3 Bing. N. C. 888; Waller v. Lacy, 1 M. & Gr. 54, 1 Sc. N. R. 186, S. C.; Dickenson v. Hatfield, 1 Moo. & R. 141; Chealey v. Dalby, 4 You. & Coll. 228; [Sidwell v. Mason, 2 H. & N. 306.]

When a bill is given on account of part of a debt, and is paid by the drawee, the statute is not avoided by such payment, though it may be by the delivery of the bill, *Irving* v. *Veitch*, 3 M. & W. 90; *Turney* v. *Dodwell*, 3 E. & B. 136. Whether the promise implied from part-payment to the holder of a negotiable instrument is itself negotiable, *quære*. See *Cripps* v. *Davis*, 12 M. & W. 159. [Gale v. Capern, 1 A. & E. 104, per Patteson, J.

It is perhaps convenient to refer shortly in this place to a question which has not been discussed in the earlier editions of these notes, viz., what is a sufficient written acknowledgment to save the statutes, apart from the proviso as to payment in section 1 of Lord Tenterden's Act. The principles are thus summed up by Mellish, L. J., in In re River Steamer Co., Mitchell's Claim, L. R. 6 Ch. at p. 828, which passage is cited by Cleasby, B., in Skeet v. Lindsay, 2 Ex. D. 316, 46 L. J. Ex. 251. "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or secondly, there must be an unconditional promise to pay the debt, or thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed."

With regard to the first of these three propositions, it should be observed that by a long train of authorities commencing with Tanner v. Smart, 6 B. & C. 603, it is conclusively settled that an absolute acknowledgment of the debt by itself is sufficient, because you may imply from it an unconditional promise to pay the debt, per Cleasby, B., in Skeet v. Lindsay, ubi sup. A recent decision on this point will be found in Green v. Humphreys, 26 Ch. D. 474, 53 L.

J. Ch. 625, where the Court of Appeal, reversing the decision of Pollock, B., held that there was not sufficient acknowledgment.

These being the acknowledged principles, the application of them to particular cases for the purpose of determining whether particular written expressions amounted to an absolute acknowledgment or an unconditional promise, has naturally been productive of much litigation, and in some instances has caused a remarkable diversity of judicial opinion. See the cases collected in Chasemore v. Turner, L. R. 10 Q. B. 500, 45 L. J. Q. B. 66; Quincey v. Sharpe, 1 Ex. D. 72, 45 L. J. Ex. 347, and Meyerhoff v. Froehlich, 4 C. P. D. 63. In the first of these cases, the following letter written by the defendant to one of the plaintiffs was put in at the trial at Nisi Prius. "My dear Sir. The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid. Perhaps in the meantime you will let your clerk send me an account of how it stands." At the trial Martin, B., ruled that the letter was sufficient to take the case out of the Statute of Limitations, and directed a verdict for the plaintiffs, refusing leave to move, but gave a stay of execution. The majority of the Court of Queen's Bench, viz., Blackburn and Archibald, J.J., held, Mellor, J., dissenting, that it was insufficient without further evidence and made absolute a rule for a new trial. In the Exchequer Chamber, however (Lord Coleridge, C. J., dissenting), this judgment was reversed by Cleasby, Pollock and Amphlett, BB., and Grove and Denman, JJ., and the verdict for the plaintiff stood. But if there be an express promise there can be none by implication, and if the express promise be a conditional one the condition must be fulfilled: Meyerhoff v. Froehlich, 4 C. P. D. 63, 48 L. J. C. P. 41. If there is an unqualified admission that there is a pending account between two parties which has to be settled, that "is an admission from which you may infer a promise that when the account is settled the balance shall be paid," per Kay, J., Banner v. Berridge, 18 Ch. D. 274.

An acknowledgment of a simple contract debt is insufficient to save the statute, unless made to the creditor or his agent, Fuller v. Redman, 26 Beav. 614; but an acknowledgment of a specialty debt will suffice, under 3 & 4 W. 4, c. 42, s. 5, though made to a stranger, Moodie v. Bannister, 4 Drewr. 432.]

In Badger v. Arch, 10 Ex. 333, it was held that payment to any person acting as representative of an intestate accrued for the benefit of the administrator when appointed.

[Semble that an acknowledgment in a letter written without prejudice is of no avail if an offer contained in it is not accepted: Re River Steamer Company, L. R. 6 Ch. 822.]

There is in the 9 G. 4, c. 14, a proviso, "that no memorandum or other writing made necessary by this act shall be deemed to be an agreement within any Stamp Act." The effect of this appears to be to render the stamp unnecessary where the agreement is put in merely for the purpose of avoiding the Statute of Limitations, the debt having been proved aliunde. But if it were put in as the only evidence of a debt though more than six years old, semble that it would require a stamp, Morris v. Dixon, 4 A. & E. 845. The proviso has been held to be inapplicable to the case of an unstamped promissory note, Jones v. Ryder, 4 M. & W. 32; [but where a promissory note made in 1846 was indorsed by the maker and the date altered to 1866, it was held that a new stamp was not necessary, Bourdin v. Greenwood, L. R. 13 Eq. 281, 41 L. J. Ch. 73.]

1. What claims barred by the statute can be revived.—It seems that the claim, if not necessarily an actual debt, must be an obligation arising from an executed consideration and consequently implied in law.

A count in special assumpsit on an express contract which has been barred by the statute cannot, in accordance with principle, be sustained by evidence of a new promise within six years; Carshore v. Huyck, 6 Barb. 583.

The difficulty is that in such a case, as the plaintiff has to allege and prove that a promise was actually made by the defendant at a certain time, the reply is a departure from the original statement of the cause of action.

Where indebitatus assumpsit will lie, there is no difficulty, for, from the loan, or the sale of delivery, or other facts, the law implies a promise to pay, a promise of which there is a new breach on each recurring day that the debt continues and remains unpaid. Primâ facie this relates back to the period when the debt was contracted, but, as the plaintiff has only to state and prove facts from which such promise can arise, there is nothing inconsistent with this in the promise arising at any other time.

For example, the plaintiff alleges that the defendant became indebted for money had and received, &c., and then avers a promise to pay, not existing in fact, but a legal inference from the premises and sustained by any evidence of indebtedness at the time the action was begun. To a plea of the statute, the plaintiff can show that the money was "had and received" within six years, or an acknowledgment of the existence of the debt within that period which renders evidence unnecessary; Haymaker v. Haymaker, 4 Oh. St. 272; McCurry v. McKesson, 4 Jon. 510.

The replication that the cause of action accrued within six years is not a departure but in the nature of a new assignment, indicating that the plaintiff relies, not on the obligation which arose in the first instance from the receipt of the consideration, but on the promise which the law implies on the indebtedness being shown at some later period by evidence of an express promise, a part payment, or other acknowledgment.

Precisely the same principles apply when a new promise is relied upon to support an action on a promissory note barred by the statute.

The plaintiff sets out the making of the note and avers a consequent liability and promise to pay, not existing in fact but implied in law from the existence of the liability.

Whenever by an acknowledgment or new promise at any later period, the obligation can be shown to still exist, in the same way another implied promise to pay arises. Hence such an acknowledgment may be given in evidence to suppose the implied promise without any variance from the declaration; Leaper v. Tatton, 16 East 420.

It is well settled that a promise or acknowledgment will not affect the operation of the statute on actions of tort; Oothout v. Thompson, 20 Johns. 277; Ott v. Whitworth, 8 Humph. 494.

- 2. What will remove the bar of the statute.—A. An express promise to pay the debt. All the cases agree on this point.
- B. A promise to pay it, not express but implied from the circumstances; Johnson v. Evans, 8 Gill 155; Ross v. Ross, 20 Ala. 105; Reener v. Crull, 19 Ill. 109; Ditch v. Vollhardt, 82 Ill. 134; Sprogle v. Allen, 38 Md. 331; Oakson v. Beach, 36 Iowa 171; Sigourney v. Drury, 14 Pick. 390; Phelps v. Williamson, 26 Vt. 230; Joslyn v. Smith, 13 Vt. 357.

The important consideration is, under what circumstances a promise will be implied.

"A jury will be authorized and bound to infer such promise from a (1) clear, (2) unconditional and unqualified admission of the existence of the debt, (3) at the time of such admission, if, (4) unaccompanied with any refusal to pay or declaration indicative of any intention to insist on the Statute of Limitations as a bar."

Shaw, C. J., in Sigourney v. Drury, 14 Pick. 390; Knight v. House, 29 Md. 194.

(1) That the acknowledgment must be "clear" and unambiguous; see Bryan v. Ware, 20 Ala. 687; Grant v. Ashley, 7 Eng. 762; Bell v. Crawford, 8 Gratt. 119; Ten Eyek v. Wing, 1 Mich. 40; Penley v. Waterhouse, 3 Clarke 418; Stewart v. Rickens, 4 Zab. 427; Conwell v. Buchanan, 7 Blackf. 537; Robbins v. Farley, 2 Strob. 348; Dickinson v. McCanry, 5 Ga. 486; McLellan v. Albee, 17 Me. 184; Pray v. Garcelon, 17 Me. 145; Porter v. Hill, 4 Greenlf. 41; Ventris v. Shaw, 14 N. H. 422; Shaw v. Newell, 1 R. I. 488; Frey v. Kirk, 4 Gill and J. 509; Taylor v. Stedman, 11 Ired. 447; Cross v. Connor, 14 Vt. 394;

White v. Dow, 23 Vt. 300; Ayres v. Richards, 12 Ill. 146; Harrison v. Handley, 1 Bibb 443.

It need not be made expressly or in words, but may be implied from any act which necessarily presupposes the existence of the debt and an obligation to pay it; Bowman v. Downer, 22 Vt. 532; Spangler v. McDaniel, 3 Ind. 275; Grayson v. Taylor, 14 Texas 672.

The burden is on the plaintiff, so he must make it appear that the debt was actually due and that the debtor, knowing this, meant to acknowledge a liability to pay it; Gibson v. Grosvenor, 4 Gray 606; Magberry v. Willoughby, 5 Neb. 370; Wakeman v. Sherman, 5 Seld. 88; Chambers v. Garland, 3 Iowa 322; Pritchard v. Howell, 1 Wis. 131; Smith v. Fly, 24 Texas 345; Gilmer v. McMurray, 7 Jon. 479; Bangs v. Hall, 2 Pick. 368; Moore v. Hyman, 13 Ired. 272; Goodwin v. Buzzell, 35 Vt. 9; Evans v. Carey, 29 Ala. 99; Wilcox v. Williams 5 Nev. 206; Leigh v. Linthecum, 30 Texas 100.

It is not enough for the debtor to admit that the debt is due, unless it appears that he means to pay it; Wakeman v. Sherman, 5 Seld. 85; Gray v. McDowell, 6 Bush 375.

Though, in the absence of other evidence, a man that admits a debt will be presumed willing to pay it; Chambers v. Garland, 3 Iowa 322; Stockett v. Sasseer, 8 Md. 374; Pritchard v. Howell, 1 Wis. 131; Evans v. Carey, 29 Ala. 99; Phelps v. Williamson, 26 Vt. 230.

The acknowledgment must be shown to relate to the debt which is the cause of action; Nash v. Hodgson, 1 Kay 650; Stafford v. Bryan, 3 Wend. 532; Hart v. Boyt, 54 Miss. 547; Martin v. Broach, 6 Ga. 21; Lockhart v. Eaves, Dud. (S. C.) 321; Arey v. Stephenson, 11 Ired. 86; Brailsford v. James, 3 Strob. 171; Broxley v. Gayle, 19 Ala. 151.

But this will be presumed unless the existence of more than one debt is shown; Bailey v. Crane, 21 Pick. 223; Woodbridge v. Allen, 12 Metc. 470; Gibson v. Grosvenor, 4 Gray 606; Coles v. Kelsey, 2 Texas 541; Smith v. Leeper, 10 Ired. 86; Moore v. Hyman, 13 Ired. 272; Brown v. State Bank, 5 Eng. 134; Wood v. Wylds, 6 Eng. 754; Guy v. Tams, 6 Gill 82; Penley v. Waterhouse, 3 Clark 418; Mitchell v. Clay, 8 Tex. 413; Dobbs v. Humphries, 10 Bing. 446; Corey v. Bath, 35 N. H. 530, 550; Boyd v. Hurlbert, 41 Mo. 264; Whitney v. Bigelow, 4 Pick. 110.

To the contrary, apparently, however, see Robbins v. Farley, 2 Strob. 348; Faison v. Bowden, 72 N. C. 405; Pray v. Garcelon, 5 Shep. 145.

Where there is an unsettled account containing several charges or items, especially if part of them are barred by the statute and part not, a general admission of indebtedness, not naming the amount due or mentioning any specific portion, is too indefinite to affect the statute; Hull v. Richardson, 19 Penn. St. 388; Morgan v. Walton, 4 Pa. St. 321; Harbold v. Kuntz, 16 Pa. St. 210; Suter v. Sheeler, 22 Pa. St. 308; Clarke v. Dutcher, 9 Cow. 674; Buckingham v. Smith, 23 Conn. 453; Peebles v. Mason, 2 Dev. 367; Allen v. Allen, 1 Bush 60; Hale v. Hale, 4 Humph. 183.

When there is no doubt as to what debt is meant, it is not necessary that the amount should be mentioned in the acknowledgment, provided it is certain and liquidated; Thompson v. French, 10 Yerg. 452; Hazlebaker v. Reeves, 2 Jon. 264; Davis v. Steiner, 14 Pa. St. 275; Dinsmore v. Dinsmore, 21 Me. 433.

A promise to "settle" an unliquidated claim, or to "pay what is due," or to "refer," may or may not be a sufficient acknowledgment. It is a question of intention. In most cases it has been held insufficient. It is ambiguous whether the debtor means to pay or merely to adjust or liquidate; Peebles v. Mason, 2 Dev. 367; Faison v. Bowden, 72 N. C. 405; Suter v. Sheeler, 22 Penn. St. 308; Harbold v. Kuntz, 16 Penn. St. 210; Emerson v. Miller, 27 Penn. St. 278; Sutton v. Burruss, 9 Leigh, 381; Bell v. Crawford, 8 Gratt. 110; Leigh v. Linthecum, 30 Texas 100; Broddie v. Johnson, 1 Sneed 464; Mills v. Taber, 5 Jon. 412; Loftin v. Aldridge, 3 Jon. 328; Moore v. Hyman, 13 Ired. 272; Mask v. Philler, 32 Miss. 237; Shaw v. Allen, 1 Bus. 58; Brayton v. Rockwell, 41 Vt. 621.

In others, very similar remarks have been held to remove the bar; Hunter v. Kittredge, 41 Vt. 621; Walker v. Butler, 6 E. & B. 506; Higdon v. Stewart, 17 Md. 105; Warliek v. Peterson, 58 Me. 408.

When the debt is unliquidated, as a rule, the amount must be specified which the debtor is willing to pay.

A promise not to plead the statute has commonly been regarded as the same thing as a promise to pay the debt; Paddock v. Colby, 18 Vt. 485; Brown v. Bank, 5 Eng. 134; Smith v. Leeper, 10 Ired. 86; Randon v. Toby, 11 How. 493; Cooper v.

Parker, 25 Vt. 502; Noyes v. Hall, 28 Vt. 645; Utica Ins. Co. v. Bloodgood, 4 Wend. 652; Allen v. Webster, 15 Wend. 284.

Part Payment of a debt whether in money, note, or goods is usually intended as an admission of its existence and consequently has the same effect as any other unqualified acknowledgment; Winchell v. Hicks, 18 N. Y. 559; Shoemaker v. Benedict, Kern. 176, 185; Isley v. Jewett, 2 Metc. 168; Sibley v. Lumbert, 30 Me. 253.

It must appear that it was intended as a part payment of a greater sum; primâ facie a payment is intended as a discharge wholly, or pro tanto without relation to anything else; Livermore v. Rand, 26 N. H. 85; Pond v. Williams, 1 Gray 630; Shoemaker v. Benedict, 1 Kern. 176; Smith v. Eastman, 3 Cush. 355; Prenatt v. Runyon, 12 Ind. 174.

It must be considered in the light of all the surrounding circumstances; Smith v. Eastman, 3 Cush. 355; Hale v. Morse, 49 Conn. 481; Jewett v. Petit, 4 Mich. 508; Bell v. Crawford, 8 Gratt. 110; Davis v. Amy, 2 Gratt. 412; and should go to the jury like any other fact; Hollis v. Palmer, 2 Bing. (N. C.) 713; Hodge v. Manley, 25 Vt. 210; Armstead v. Brooke, 18 Ark. 521; Livermore v. Rand, 26 N. H. 85; Arnold v. Downing, 11 Barb. 554.

The payment of interest is usually an admission that the principal is due and payable; Sanford v. Hayes, 19 Conn. 591; Marcelin v. The Creditors, 21 La. An. 423; Fryeburg v. Osgood, 21 Me. 176. But a part payment of principal is not necessarily any acknowledgment as to interest; Collyer v. Willock, 4 Bing. 313.

When there are several obligations contracted at different times, and a general payment without appropriation by the debtor, the creditor can usually appropriate it most advantageously to himself and revive that portion, if any, of the obligations barred by the statute, or apply it generally to the whole indebtedness; Peck v. N. Y. Steamship Co., 5 Bosw. 225; Dyer v. Walker, 54 Me. 18.

Some cases hold that he can apply it to what debt he pleases, but cannot distribute it so as to take several debts out of the statute: Ayre v. Hawkins, 19 Vt. 28; Goodwin v. Buzzell, 35 Vt. 9.

In many of those states where an acknowledgment or new

promise is required by the statute to be in writing, an exception is made of an acknowledgment by part payment which may be shown by parol evidence; McLaren v. McMartin, 36 N. Y. 88; Sibley v. Lumbert, 30 Me. 253; Egery v. Decrew, 53 Me. 392; Ketchem v. Hill, 42 Ind. 64.

The rule is different in Georgia where a writing is required in all cases; Caldwell v. Ferrell, 20 Ga. 94; Holland v. Chaffin, 22 Ga. 343. An endorsement of a part payment on a note, not made by the debtor, is no evidence that the payment was made; Porter v. Blood, 5 Pick. 54; Jones v. Jones, 4 N. H. 219; Chandler v. Lawrance, 3 Mich. 261; but if made by the creditor before the statute has run it can go to the jury as an admission against interest, and consequently available for both parties; Roseboom v. Billington, 17 Johns. 182; Clapp v. Ingersol, 11 Me. 83; Concklin v. Pearson, 1 Rich. 391; Haven v. Hacheway, 20 Me. 245; Smith v. Simms, 9 Ga. 418; Young v. Perkins, 29 Minn. 173; Maskell v. Pooley, 12 L. An. 661. In several states statutes require an endorsement to be signed by the debtor, in order to be in itself sufficient evidence of payment.

- (2) Where an acknowledgment is "qualified" or "conditional," the bar of the statute is not removed until the terms or conditions are fulfilled; Cocks v. Weeks, 7 Hill 45; Farmers' Bank v. Clarke, 4 Leigh 603; Luna v. Edmiston, 5 Sneed 159; Hayden v. Johnson, 26 Vt. 758; Mattocks v. Chadwick, 71 Me. 313; Wachler v. Albee, 80 Ill. 47; Shaw v. Newell, 1 R. I. 488; Sweet v. Franklin, 7 R. I. 355; Wakeman v. Sherman, 4 Seld. 85; Stewart v. Reckless, 4 Zab. 427; Bell v. Morrison, 1 Pet. 351; Farley v. Kustenbader, 3 Penn. St. 418; Pearson v. Darrington, 31 Ala. 227; McGlensey v. Fleming, 4 Dev. & B. 129; Wolfe v. Fleming, 1 Ired. 290; Brenneman v. Edwards, 55 Iowa 374; Smith v. Eastman, 3 Cush. 355; Mumford v. Freeman, 8 Metc. 432.
- (3) The admission must show a willingness to assume an immediate obligation, and not be a mere expression of hope or expectation; Blakeman v. Fonda, 41 Conn. 565; Norton v. Shepard, 48 Conn. 141; Ecker v. First Nat. Bank, 59 Md. 291; Kirby v. Mills, 78 N. C. 124; Marseilles v. Kenton, 17 Pa. St. 238; Oakes v. Mitchell, 15 Me. 360; or an offer to compromise or a payment by way of compromise; Brenneman v. Edwards, 55 Iowa 374; Winchester v. Sibley, 132 Mass. 273.
 - (4) There must be nothing in what is said at the time of the

unqualified admission or in the attendant acts of the defendant, inconsistent with an intention to pay the obligation; Fries v. Boisselet, 9 S. & R. 128; Church v. Feterow, 2 R. & W. 301; Hogan v. Bear, 5 Watts 111; Zacharias v. Zacharias, 23 Penn. St. 452; Wesner v. Stern, 97 Pa. St. 322; Wetzell v. Bussard, 11 Wheat, 315; Moore v. Bank of Columbia, 6 Pet. 92; Allen v. Webster, 15 Wend, 284; Stafford v. Richardson, 15 Wend, 302; Philps v. Stewon, 12 Vt. 256; Manning v. Wheeler, 13 N. H. 486; Thayer v. Mills, 14 Me. 300; Goldsby v. Gentle, 5 Blackf. 436; Hay v. Kramer, 2 W. & S. 137. Though the debtor will not be allowed to lull the creditor to sleep by ambiguous language calculated to deceive him.

When a debtor has once made his election to be bound, he cannot afterwards recede from it; Barley v. Crane, 21 Pick. 323; Mumford v. Freeman, 8 Metc. 432. The debtor may remove the bar as to part of a debt, and not as to all if he so wills; Graham v. Keys, 29 Penn. St. 189; McDonald v. Underhill, 10 Bush 585.

3. By whom must an acknowledgment or promise be made?—A. In General. It seems well settled that an acknowledgment by one can never be used against another who has not authorized or ratified it, when the contract of each is several, though founded on the same consideration; Bowdre v. Hampton, 6 Rich. 208; Stowers v. Blackburn, 21 La. An. 127. For example, the acknowledgment of the endorser of a note will not operate against the maker or that of the maker against the endorser; Bibb v. Peyton, 11 S. & M. 275; Dean v. Munroe, 32 Ga. 28.

As to the effect of payment or acknowledgment by one on the obligation of the other in case of principal and surety, see Haight v. Avery, 16 Hun 252; Nat. Bank v. Ballou, 49 N. Y. 155; Delevan v. Cotton (Wise.), 9 N. W. Rep. 926, 928.

The joint nature of the obligation must appear aliunde and not merely by the acknowledgment; Hackley v. Hastie, 3 Johns. 536; Shelton v. Cocke 3 Munf. 240; Smith v. Ludlow, 9 Johns. 267.

B. Joint Debtor or Contractor. — The decision in Whiteomb v. Whiting, as to the effect, as regards the Statute of Limitations, of unauthorized acknowledgment or payment by a joint contractor, is law to-day in but very rew of the American states or territories. In some of them the courts have from the first

refused to follow it; in most of them the contrary has been established by statute. The general rule now is that in all cases the promise or acknowledgment must be made by the debtor whom it is sought to charge, or his authorized agent; Smith v. Ryan, 66 N. Y. 352; Kelly v. Weber, 27 Hun 8.

This rule has been established by the Courts in the following states:—

Florida: Tate v. Clements, 16 Florida 339. Indiana: Conkey v. Barbour, 22 Ind. 196. New Hampshire: Whipple v. Stevens, 22 N. H. 219. Pennsylvania: Coleman v. Fobes, 22 Pa. St. 156. Tennessee: Belotes Exrs. v. Wynne, 7 Yer. 534; and also seems to be the law in Illinois.

In the following states and territories it has been embodied in statute, and in all but two or three of them the promise or acknowledgment, if not by part payment, must be made in writing signed by the party to be charged:—

Alabama: Code 1876, sec. 3240. Arizona: Compiled Laws 1877, ch. 35, sec. 2108. Arkansas: Digest of Stats. 1874, ch. 88, secs. 4134, 4135. California: Code of Civil Procedure, sec. 10360. Colorado: General Laws 1877, ch. 60, sec. 19. Dakota: Revised Code 1877, part II. ch. 6, sec. 73. Georgia: Code 1873, part II. title VII. ch. 9, art 9, sees. 2930-2934. Idaho: General Laws 1880, 1881, sec. 178. Illinois: Revised Stats. 1881, ch. 83, sec. 16. Indiana: Statutes 1876, vol. II. part II. ch. 1, art. 12, secs. 220-223. Iowa: Revised Code 1880, title XVII. ch. 2, sec. 2539. Kansas: Compiled Laws, ch. 80, art. 3, sec. 24. Louisiana: R. S. 1876, sec. 2818. Maine: Revised Stats, 1883, ch. 81, sees. 97-100. Massachusetts: Public Statutes 1882, title V. ch. 197, secs. 15-18. Michigan: Compiled Laws 1871, secs. 7164, 7165. Minnesota: General Stats. ch. 66, title II. sec. 24. Mississippi: Revised Code, 1880, ch. 76, sec. 2688. Missouri: Revised Stats. 1879, ch. 48, secs. 3248, 3250. Montana: Revised Stats. 1879, first div., title III. sec. 53. Nebraska: Compiled Stats. part II. title II. sec. 22. Nevada: Compiled Laws 1873, sec. 1045. New Jersey: Revision of 1874, Lim. of actions, secs. 10, 11. New Mexico: General Laws, art. 32, ch. 73, sec. 13. New York: Code of Civil Procedure, sec. 395. North Carolina: Code of Civil Procedure, ch. 17, title IV. secs. 50-52. Ohio: Revised Stats. 1880, sec. 4992. Oregon: Civil Code, ch. 1, title II. sec. 24. South Carolina: Code of Procedure, sec. 133. Texas: Revised Stats. 1879, art. 3219. Utah: Compiled Laws 1876, title XVIII. Vermont: Revised Laws 1880, ch. 56, secs. 974-977. Virginia: Code 1873, title XLV. ch. 146, sec. 10. Washington Territory: Code, sec. 44. West Virginia: Revised Stats. 1879, ch. 119, sec. 8. Wisconsin: Revised Stats. 1878, secs. 4243-4248. Wyoming: Compiled Laws 1876, ch. 13, sec. 21.

This leaves only four states where possibly it would be still followed: Connecticut, Delaware, Maryland, and Rhode Island: Caldwell v. Sigourney, 19 Conn. 37; Schindel v. Gates, 46 Md. 604; Wheelock v. Doolittle, 18 R. I. 440.

In Maryland, however, there is the limitation that the acknowledgment must be made before the statute has once run, on the ground that the common interest which alone makes the admission of one debtor binding on another ceases whenever the statute takes effect, and, therefore, they are no more responsible for each other's words and actions than mere strangers.

Ratification may take the place of authorization, but mere neglect by one not actually present to disclaim the act of a co-contractor on hearing of it, will not be enough to ratify his acknowledgment; Littlefield v. Littlefield, 91 N. Y. 203; Gould v. Cayuga Bank, 86 N. Y. 75; Glick v. Crist, 37 Ohio St. 388; Mainzinger v. Mohr, 41 Mich. 685; Whipple v. Stevens, 2 Fos. 227.

C. Partner. — Before dissolution, in accordance with the general rule, one partner can bind another by an acknowledgment, if given in the ordinary course of business, the partnership relation making each the agent of the others. After dissolution they are regarded in the same way as other joint obligors; Baker v. Stackpole, 9 Cow. 420; Yale v. Eames, 1 Metc. 486; National Bank v. Norton, 1 Hill 572; Mitchell v. Ostrom, 2 Hill 520; Schoneman v. Fegley, 7 Pa. St. 433; Clark v. Brown, 86 Pa. St. 502; Lazarus v. Fuller, 89 Pa. St. 331; Daniel v. Nelson, 10 B. Mon. 316; Hamilton v. Summers, 12 B. Mon. 11; Hamilton v. Seaman, 1 Car. 185; Palmer v. Dodge, 4 Ohio St. 21; Tate v. Clements, 16 Fla. 339; Hance v. Hair, 25 Ohio St. 349; Campbell v. Brown, 86 N. C. 376.

So where Whitcomb v. Whiting is followed, one partner of such firm can still by an acknowledgment revive a debt or contract as to all; Austin v. Bostwick, 9 Conn. 496; Caldwell v. Sigourney, 19 Conn. 37; Turner v. Ross, 1 R. I. 88; Wheelock v. Doolittle, 18 R. I. 440. And where Whitcomb v. Whiting is

not followed a fortiori, unless expressly authorized, he can revive it only as against himself; Bell v. Morrison, 1 Pet. 351; Exeter Bank v. Sullivan, 6 N. H. 124; Steele v. Jennings, 1 McMull. 297; Beloles Ex'rs v. Wynne, 7 Yerg. 534; Muse v. Donelson, 2 Humph. 166; Yandes v. Le Favour, 2 Blackf. 371; Dickerson v. Turner, 12 Ind. 239; Lowther v. Chapell, 8 Ala. 353; Levy v. Cadet, 17 S. & R. 126; Searight v. Craighead, 1 P. & W. 135; Fonte v. Bacon, 24 Miss. 156; Briscol v. Anketell, 28 Miss. 361; Palmer v. Dodge, 4 Ohio St. 21, 36; Myatts v. Bell, 41 Ala. 222; Bush v. Stowell, 71 Pa. St. 208; Kallenbach v. Dickinson, 100 Ill. 427; Mayberry v. Willoughby, 5 Neb. 370.

Payment or other acknowledgment by one partner of a dissolved firm, under the direction of the other, binds both; Haight v. Avery, 16 Hun 252; McConnell v. Merrill, 53 Vt. 149.

The same is true, in all similar cases, for instance, when two of three sureties referred the creditor to the principal, who made a partial payment, the debt was held to be renewed as to them, but not against the third surety who was ignorant of the transaction; Winchell v. Hicks, 18 N. Y. 559.

Proof that the firm was dissolved will not be a sufficient answer to a promise or acknowledgment by one of the partners, unless it is shown that notice was given to the creditor; Tappan v. Kimball, 30 N. H. 136; Forbes v. Garfield, 32 Hun 389.

D. Executor or Administrator. — In many of the earlier and some recent decisions an acknowledgment or promise by an executor or administrator is held to have the same effect in removing the bar of the statute as if it had been made by the debtor in his lifetime; Whitaker v. Whitaker, 6 Johns. 112; Larason v. Lambert, 7 Halls 247; Chambers v. Fennemore, 4 Harr. 368; Baxter v. Penniman, 8 Mass. 133; Emerson v. Thompson, 16 Mass. 429; Foster v. Starkie, 12 Cush. 324; Whitney v. Bigelow, 4 Peck 110, 113; Semmes v. Magruder, 10 Md. 242; Walch v. McGrath, 59 Iowa 519; Black v. Doman, 51 Mo. 31; Ecker v. First Nat. Bank, 59 Md. 291; Griffin v. The Justices, 17 En. 96; Shreve v. Joyce, 36 N. J. Law 44; Northeut v. Wilkinson, 12 B. Mon. 408; Badger v. Gilmore, 33 N. H. 361.

The weight of authority is now against this proposition; Oakes v. Mitchell, 15 Me. 360; Bunker v. Atheam, 35 Me. 364; Bloodgood v. Bruen, 8 N. Y. 362; Cayuga Bank v. Bennett, 5

Hill 236; Mead v. Jenkins, 4 Redf. 369 (but see contra later New York cases; Cotter v. Quinlan, 2 Dem. 29; Matter of Dunn, 5 Dem. 124); Ciples v. Alexander, 2 Cons. R. 767; Tullock v. Dunn, Ry. & M. 446; Caruthers v. Mardiss, 3 Ala. 599; Conoway v. Spicer, 5 Harr. 425; Fritz v. Thomas, 1 Whart. 71; Reynolds v. Hamilton, 7 Watts 420; Forney v. Benedict, 5 Penn. St. 225; Clark v. Maquire, 35 Penn. St. 259; Patterson v. Cobb. 4 Fla. 481; Henderson v. Illsley, 11 Sm. & M. 9; Peck v. Botsford, 7 Conn. 172; Steel v. Steel, 2 Jon. 64; Moore v. Hillebrout, 14 Texas 312.

A few cases have attempted to draw a distinction between a promise or part payment and a mere acknowledgment, but there seems none in principle; Baxter v. Penniman, 8 Mass. 133; Bloodgood v. Bruen, 8 N. Y. 362.

In others, it has been intimated that an acknowledgment or promise by all of several executors or administrators will remove the bar of the statute when the same by part of their number would not; Conoway v. Spicer, 2 Harr. 425; Hueston v. Hueston, 2 Ohio St. 488; Bloodgood v. Bruen, 4 N. Y. 362, 370; Caruthers v. Mardiss, 3 Ala. 599; Cayuga Bank v. Bennett, 5 Hill 236.

This distinction has been expressly repudiated in many states, and it has been held that an express promise by one of several executors or administrators will take the case out of the statute as to all: Johnson v. Beardslee, 15 Johns. 3; Briggs v. Ex'rs of Starke, 2 Cons. R. 111; Hords Admrs. v. Lee, 4 Mon. 36; Griffin v. Justices, 17 Ga. 96; Shreve v. Joyce, 36 N. J. Law 44.

The matter is now quite generally regulated by statute.

- E. Assignee of Insolvent Debtor. In Clark v. Chambers (Neb. 1885), 22 N. W. Rep. 229, it was held, citing; Marienthal v. Master, 16 Ohio 566; Stoddard v. Doane, 7 Gray (Mass.) 387; Pickett v. King, 38 Barb. 193; Roosevelt v. Mark, 6 Johns. Ch. 266; that the payment of a dividend by the assignee would not take the residue of the debt out of the statute, the Court remarking, "While it cannot be said that the argument is all on the side of the above cases, and there are high authorities holding the other way of thinking, yet I think the weight of reason as well as of authority is with them.
 - (4) To whom must the promise or acknowledgment be made?

 In many of the earlier cases it was held that any acknowledg-

ment from which the continued existence of debt could be inferred was sufficient whether made to a third party or to the plaintiff in the action; Newkirk v. Campbell, 5 Harr. 380; McRae v. Kennon, 1 Ala. 225; Soulden v. Van Rensselaer, 9 Wend. 297; Titus v. Ash, 24 N. H. 319; Philips v. Peters, 21 Barb. 351; Watkins v. Stevens, 4 Barb. 168; Carshore v. Huyck, 6 Barb. 585; Whitney v. Bigelow, 4 Pick. 110; Minkler v. Minkler, 16 Vt. 193; Oliver v. Gray, 1 Harr. & G. 204; Bird v. Adams, 7 Ga. 505; St. John v. Garron, 4 Post. 225; Edmundson v. Penny, 1 Penn. St. 335; Hassenger v. Solus, 5 S. & R. 416; Evans v. Carey, 29 Ala. 99; Criswell v. Criswell.

The later cases make a distinction between an acknowledgment to a third person, not intended to reach the ear of the creditor, and one where the expectation was that it would be conveyed to him and influence his conduct. In the first instance holding that the bar of the statute was not removed; Bloodgood v. Bruen, 4 Sandf. 427; Wakeman v. Sherman, 5 Sandf. 85; Kyle v. Wells, 17 Penn. St. 286; Gillingham v. Gillingham, 17 Penn. St. 302; Pearson v. Darrington, 32 Ala. 227; Allen v. Collier, 70 Mo. 138; McGrew v. Forsyth, 80 Ill. 47; Fletcher v. Updike, 67 Barb. 364; Reeves v. Correll, 19 Ill. 189; McKinney v. Snyder, 78 Penn. St. 497; but that it was in the latter; Winterton v. Winterton, 7 Hun 230; Wakeman v. Sherman, 5 Sel. 85, 92; 2 Story Eq. Secl. 1521; Collett v. Frazier, 3 Jon. Eq. 80; Jordan v. Hubbard, 26 Ala. 433; Evans v. Carev, 29 Ala. 99; Criswell v. Criswell, 59 Pa. St. 130.

It seems to be a question of intention in any case, and the proper test should be whether the debtor intends to make an irrevocable engagement to pay the debt to the creditor. This appearing, it is immaterial to whom the acknowledgment or promise is made; Bloodgood v. Bruen, 11 N. Y. 362, 367; Evans v. Carey, 29 Ala. 99; Criswell v. Criswell, 59 Pa. St. 130; Black v. White, 13 S. C. 37; DeForest v. Warner, 98 N. Y. 217.

The weight of authority seems to establish that a promise or acknowledgment by the maker or acceptor of a promissory note or bill of exchange, made to one of the parties, will take the debt out of the statute as to all, though the one to whom it was made had at the time transferred the instrument; Dean v. Hewit, 5 Wend. 257; Pinkerton v. Bailey, 8 Wend. 600; Bad-

ger v. Gilmore, 33 N. H. 361; Way v. Sperry, 6 Cush. 238; Cripps v. Davis, 12 M. & W. 159.

5. When. — The distinction above alluded to as made in Maryland, between the office of an acknowledgment made before the statute has run, and one made afterwards, has been noticed elsewhere, but the reason given seems to limit it to the case of co-obligor.

The fact that the statute has run, may, however, be very material as showing intention. An act that would indicate an intention to acknowledge a debt before the statute had run, might not be sufficient to show such intention afterwards; Matter of Dunn, 5 Dem. (N. Y.) 124.

6. Form of pleading.—It is well settled, in accordance with the foregoing, that in actions at law the new promise is proper matter for a replication, and not for the original statement of the cause of action; Guy v. Tams, 6 Gill 82; Little v. Blunt, 9 Pick. 488; Martin v. Williams, 17 Johns. 330; Van Allen v. Feltz, 32 Barb. 139; Biscoe v. Stone, 6 Eng. 39; Tompkins v. Brown, 1 Dem. 247; Watkins v. Stevens, 4 Barb. 168; Titus v. Ash, 24 N. H. 319; Shackleford v. Douglass, 31 Miss. 95; Way v. Sperry, 6 Cush. 238.

The reason is often stated to be that the new promise is only a matter of evidence and does not create a new cause of action; Dean v. Hewit, 5 Wend. 257; Carshore v. Huyck, 6 Barb. 583.

This, as we have seen, is not strictly correct. The recovery is on a new cause of action, though, owing to the general form of pleading, the declaration does not show it. The mistake seems to have been in regarding the declaration as on the original cause of action, whereas from the first it is based on the one arising at the time of the new promise or acknowledgment, and the reply by way of new assignment makes this clear; Keener v. Crull, 19 Ill. 189: Briscoe v. Anketell, 28 Miss. 361; Stewart v. Reckless, 4 Zab. 427, 429.

MOSTYN v. FABRIGAS.

MICHAELMAS. - 15 GEO. 3, B. R.

[REPORTED COWP. 161.]

Trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca.

If the imprisonment was justifiable, the governor must plead his authority specially (a).

On the 8th of June, in last term, Mr. Justice Gould came personally into court to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of Common Pleas, by Anthony Fabrigas against John Mostyn, for an assault and false imprisonment: in which the plaintiff declared that the defendant on the 1st of September, in the year 1771, with force and arms, &c., made an assault upon the said Anthony at Minorca (to wit) at London aforesaid, in the parish of St. Mary-le-Bow, in the word of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca, aforesaid, to Carthagena, in the dominions of the King of Spain, &c., to the plaintiff's damage of 10,000%.

The defendant pleaded, 1st, Not guilty; upon which issue

was joined. 2ndly. A special justification, that the defendant at that time, &c., and long before, was governor of the said Island of Minorca, and during all that time was invested with and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said Island of Minorca, in parts beyond the seas; and the said Anthony, before the said time when, &c., to wit, on the said 1st of September, in the year aforesaid, at the Island of Minorca aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace; whereupon the said John, so being governor of the said island of Minorca as aforesaid, at the same time, when, &c., in order to preserve the peace and government of the said island, was obliged to and did then and there order the said Anthony to be banished from the said island of Minorca; and, in order to banish the said Anthony, did then and there gently lav hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain the said Anthony, before he could be banished from the said island, for a short space of time, to wit, for the space of six days then next following; and afterwards, to wit, on the 7th of September, in the year aforesaid, at Minorca, aforesaid, did carry and cause to be carried the said Anthony on board a certain vessel from the island of Minorca aforesaid to Carthagena aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony in the first count of the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space or time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagena, in the dominions of the King of Spain, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c., without this, that the said John was guilty of the said trespass, assault and imprisonment, at the parish of St. Mary-le-Bow, in the ward of Cheap, or elsewhere, out of the said island of Minorca aforesaid, Replication de injurià suà proprià absque tali causà. At the trial the jury gave a verdict for the plaintiff, upon both issues, with 3.000l. damages, and 901. costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows: on behalf of the plaintiff, that the defendant at the island of Minorca on the 17th of September, 1771, seized the plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of Minorca to Carthagena in Spain. On behalf of the defendant, that the plaintiff was a native of Minorea and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the Arraval of St. Phillip's, in the said island; that Minorca was ceded to the crown of Great Britain, by the treaty of Utrecht, in the year 1713. That the Minorquins are in general governed by the Spanish laws, but when it serves their purpose plead the English laws: that there are certain magistrates, called the Chief Justice Criminal, and the Chief Justice Civil, in the said island: that the said island is divided into four districts, exclusive of the Arraval of St Phillip's; which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor; so that no magistrate of Mahon could go there to exercise any function, without leave first had from the governor: that the Arraval of St. Phillip's is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than anywhere else in the island; and where the judges cannot interfere but by the governor's consent: that nothing can be executed in the Arraval but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder, and other great offences committed within the said Arraval, upon application to the governor, he generally appoints the assesseur criminel of Mahon, and for lesser offences, the mustastaph; and that the said John Mostyn, at the time of the seizing, imprisoning, and banishing the said Anthony, was the governor of the said island of Minorca, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said Anthony to be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

This case was argued this term by Mr. Buller, for the plaintiff in error, and Mr. Peckham, for the defendant. Afterwards

in Hilary Term, 1775, by Mr. Serjeant Walker, for the plaintiff, and Mr. Serjeant Glynn, for the defendant.

For the plaintiff in error. There are two questions, 1st, Whether in any case an action can be maintained in this country for an imprisonment committed at *Minorca*, upon a native of that place?

2ndly. Supposing an action will lie against any other person, whether it can be maintained against the governor acting as such in the peculiar district of the *Arraval* of *St. Phillip's?*

In the discussion of both these questions, the constitution of the island of Minorca and of the Arraval of St. Phillip's, are material. Upon the record it appears, that by the treaty of Utrecht, the inhabitants had their own property and laws preserved to them. The record further states that the Arraval of St. Phillip's, where the present cause of action arose, is subject to the immediate control and order of the governor only, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the lex loci differs from the law of this country; the lex loci must decide, and not the law of this country. The case of Robinson v. Bland, 2 Bur. 1078, does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered into between British subjects with a view to the law of England, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of England would be a crime, but in the country where it is committed is no crime at all, the lex loci cannot but be the rule. It was so held by Lord Chief Justice Pratt, in the case of Pons v. Johnson, and in a like case of Ballister v. Johnson, sittings after Trinity Term, 1765.

2nd. In criminal cases, an offence committed in foreign parts cannot, except by particular statutes, be tried in this country: 1 Vesey, 246. East India Company v. Campbell. If crimes committed abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country, which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis the law of God, and the law of nature; and, therefore, though the trial

be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In Keilwey, 202, it was held that the Court of Chancery cannot entertain a suit for dower in the Isle of Man, though it is part of the territorial dominions of the crown of England. 3rd. The cases where the courts of Westminster have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects; and even there it is done by a legal fiction; namely, by supposing under a videlicet, that the cause of action did arise within this country, and that the place abroad lay either in London or Islington. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the court has no jurisdiction. 2 Lutw. 946. Assault and false imprisonment of the plaintiff, at Fort St. George, in the East Indies, in parts beyond the seas; viz., at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. It was resolved, by the whole court, that the declaration was ill, because the trespass is supposed to be committed at Fort St. George, in parts beyond the seas, videlicet, in London; which is repugnant and absurd: and it was said, by the Chief Justice, that if a bond bore date at Paris, in the Kingdom of France, it is not triable here. In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in London, in the parish of St. Mary-le-Bow, or elsewhere out of the island of Minorca. Besides it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore, as Justice Dodderidge says, in Latch, 4, the court must take notice, that the cause of action arose out of their jurisdiction.

Before the statute of Jeofails, even in cases the most transitory, if the cause of action was laid in *London*, and there was a local justification, as at *Oxford*, the cause must have been tried at *Oxford*, and not in *London*. But the statute of Jeofails does not extend to *Minorca*: therefore, this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of *Minorea*, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, or means to answer them. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence without the power of proving either the law or the facts of his case.

Second point. If an action would lie against any other person, yet it cannot be maintained against the Governor of *Minorea*, acting as such, within the *Arraval* of *St. Phillip's*.

The Governor of Minorca, at least within the district of St. Phillip's is absolute: both the civil and criminal jurisdiction vest in him as the supreme power, and as such he is accountable to none but God. But supposing he were not absolute: in this case, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is answerable. 1 Salk. 396, Groenvelt v. Burwell; 2 Mod. 218, Show. Parl. Cases, 24, Dutton v. Howell, are in point to this position; but more particularly the last case, where in trespass, assault, and false imprisonment, the defendant justified as governor of Barbadoes, under an order from the council of state in Barbadoes, made by himself and the council, against the plaintiff (who was the deputygovernor), for maladministration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as judge; all the records and evidence, which relate to the transaction, are in Minorca, and cannot be brought here: the laws there are different from what they are in this country; and as it is said in the conclusion of that argument, government must be very weak indeed, and the persons entrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to show that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the court.

Mr. Peckham, for the defendant in error. 1st, the objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the court, he is for ever after precluded from making any objection to it. Year Book, 22 H. 6, fol. 7; Co. Litt. 127, b.; T. Raym. 34·1 Mod. 81; 2 Mod. 273; 2 Lord Raym. 884; 2 Vern. 483.

Secondly. An action of trespass can be brought in England for any injury done abroad. It is a transitory action, and may be brought anywhere. Co. Litt. 282; 12 Co. 114; Co. Litt. 261, b., where Lord Coke says, that an obligation made beyond seas, at Bordeaux, in France, may be sued here in England, in what place the plaintiff will. Captain Parker brought an action of trespass and false imprisonment against Lord Clive, for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between Gregory Cojimaul, an Armenian merchant, and Governor Verelst, in which the cause of action arose in Bengal. A bill was filed by the Governor in the Exchequer for an injunction, which was granted; but on appeal to the House of Lords, the injunction was dissolved; therefore, the Supreme Court of Judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

Thirdly. There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the King, though without the realm, is a natural-born subject, and as such, is entitled to sue in the King's courts. Co. Litt. 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King: 2 Burr. 858.

In 1 Salk. 404, upon a bill to foreclose a mortgage in the island of *Sarke*, the defendants pleaded to the jurisdiction, *viz.*, that the island was governed by the laws of *Normandy*, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper *Wright* overruled the plea; "otherwise there might be a failure of justice, if the Chancery could

not hold plea in such case, the party being here." In this case both the parties are upon the spot. In the case of Ramkissenseat v. Barker, upon a bill filed against the representatives of the Governor of Patna, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here. But Lord Hardwicke said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court." And he overruled the defendant's plea without hearing one counsel on either side.

The case of the Countess of Derby, Keilwey, 202, does not affect the present question; for that was a claim of dower; which is a local action, and cannot, as a transitory action, be tried anywhere. The other cases from Latch and Lutwyche were either local actions, or questions upon demurrer; therefore, not applicable to the ease before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried anywhere; the latter cannot; and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. Skinner, referred to the twelve Judges from the council board. In the year 1657, when trade was open to the East Indies, he possessed himself of a house and warehouse, which he filled with goods, at Jamby, and he purchased of the King at Great Jumby the islands of Baretha. The agents of the East India Company assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of Baretha. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th April, 1665, "Whether Mr. Skinner could have a full relief in any ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods, and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing of the house and islands in the case mentioned, he is not relievable in any ordinary court of justice." It is manifest from this case that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

Fourth point. It is contended that General Mostyn governs as all absolute sovereigns do, and that stet pro ratione voluntas is the only rule of his conduct. From whom does the governor derive this despotism? Not from the King, for the King has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a judge; and the case of Dutton v. Howell has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir John Dutton was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of Barbadoes, and only let the law take its course against a criminal. But Governor Mostyn neither sat as a military nor a civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to prosecute the innocent. If that be so, he is responsible for the injury he has done; and so was the opinion of the court of C. B. as delivered by Lord Chief Justice De Grey, on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice: and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the original imprisonment), than that he could inflict the torture. Lord Bellamont's Case, 2 Salk, 625, Pas. 12 W. 3, is a case in point to show that a governor abroad is responsible here; and the stat. 12 W. 3, passed the same year, for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question: Comyn v. Sabine, Governor of Gibraltar, Mich. 11 Geo. 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at Gibraltar; that Governor Sabine tried him by a court-martial, to which he was not subject: that he underwent a sentence of 500 lashes; and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000l. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with 700l. damages. A writ of error was brought, but the judgment affirmed.

With respect to the Arraval of St. Phillip's being a peculiar district, under the immediate authority of the governor alone, the opinion of Lord Chief Justice De Grey, upon the motion for a new trial, is a complete answer; "One of the witnesses in the cause," said his Lordship, "represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power. It was gross ignorance in that person to imagine such a thing: I may say it was impossible, that a man who lived upon the island in the station he had done, should not know better, than to think that the governor had a civil and criminal power in him. The governor is the King's servant; his commission is from him, and he is to execute the power he is invested with under that commission; which is to execute the laws of Minorca, under such regulations as the King shall make in council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca; I have at various times seen a multitude of authentic documents and papers relative to that island; and I do not believe that, in any one of them, the idea of the Arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos, and St. Phillip's, and all the district about it, is comprehended within that termino; but to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd." Therefore, as the defendant, by pleading in chief, and submitting his cause to the decision of an English jury, is too late in his objection to the jurisdiction of the court; as no disability incapacitates the plaintiff from seeking redress here; and as the action which is a transitory one is clearly maintainable in this country, though the cause of action arose abroad, the judgment ought to be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist, on the drunken Marius, to the present occasion: and they will say of Governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the *Minorquins*, if Mr. Fabrigas should be deprived of that satisfaction in damages, which the jury gave him,

At tu victrix provincia ploras.

Lord Mansfield.—Let it stand for another argument. It has been extremely well argued on both sides.

On Friday, 27th of January, 1775, it was very ably argued by Mr. Serjeant *Glynn* for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord Mansfield. — This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made being for banishing him from the island of Minorca to Carthagena in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose: therefore, he has stated it to be in Minorca; with a videlicet at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas. First, "not guilty"; secondly, that he was Governor of Minorca, by letters patent from the crown; that the plaintiff was raising a sedition and mutiny; and that, in consequence of such sedition and mutiny, he did imprison him and send him out of the island; which, as governor, being invested with all the privileges, rights, &c., of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the fact: and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evi-

dence of his; but on behalf of the defendant, evidence different from the facts alleged in his plea of justification was given, to show that the Arraval of St. Phillip's, where the injury complained of was done, was not within either of the four precincts, but is a district of itself, more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case, the judge left it to the jury, who found a verdict for the plaintiff, with 3000l. damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right, what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2ndly, that the defendant was Governor of Minorea, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the cause ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's courts in England. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's courts of justice as one who is born within the sound of Bow bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of Utrecht, makes no difference. The two other grounds are, 1st, That the defendant being Governor of Minorea, is answerable for no injury whatsoever done by him in that capacity: 2ndly, That the injury being done at Minorca, out of the realm, is not cognisable by the King's courts in England. - As to the first, nothing is so clear as that to an action of this kind, the defendant, if he has any justification, must plead it: and there is nothing more clear, than that if the court has not a general jurisdiction of

the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore, by the law of *England*, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of *England* says shall be a justification; but then it must be pleaded (a). Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the *Arraval* of *St. Phillip's*.

The first point, then, upon this ground is, the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification; because primâ facie the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that, supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall not emphatically lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of the court of Wales; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now, in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it.

⁽a) See Salk. 306; Vaugh. 138; 12 513, 514, 535, 550, 784; 4 Taunt. 67; C. 24; Lord Raym. 466; 6 T. R. 449; 2 C. & P. 146; 1 B. & C. 163; 4 B. & 3 M. & S. 411. See too 1 T. R. 493, C. 292.

For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or
criminal action will lie against him: the reason is, because upon
process he would be subject to imprisonment (a). But here
the injury is said to have happened in the Arraval of St. Phillip's, where, without his leave, no jurisdiction can exist. If
that be so, there can be no remedy whatsoever, if it is not in
the King's courts: because, when he is out of the government,
and is returned with his property into this country, there are
not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant Glynn, would alone be decisive; and it is this: that though the charge brought against him is for a civil injury, yet it is likewise of a criminal nature; because it is in abuse of the authority delegated to him by the King's letters patent, under the great seal. Now, if everything committed within a dominion is triable by the courts within that dominion, yet the effect or the extent of the King's letters patent, which gave the authority, can only be tried in the King's courts; for no question concerning the seignory can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognisable by the King's courts in England only. In the case of the Isle of Man, it was so decided in the time of Queen Elizabeth, by the chief justice and many of the judges. So that emphatically the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent, legally and properly; or whether he has abused it, in violation of the laws of England, and the trust so reposed in him.

It does not follow from hence, that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer: and if the nature of the case would have allowed

⁽a) But see, as to this position, the note, post, pp. 683, 684.

of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send a hundred of the inhabitants out of the island, from motives of real and general expediency; or suppose, upon a general suspicion, he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorised so to act? The way of knowing foreign laws is, by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated. So in the supreme resort before the King in council, the privy council determines all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey; and they inform themselves, by having the law stated to them. - As to suggestions with regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what this court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to him. She alleged a marriage in *Scotland*, but that she could not compel her witness to come up to give evidence. The court obliged the

prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court of exchequer in *Scotland*, and that the depositions so taken should be read at the trial. And they declared that they would have put off the trial of the indictment from time to time for ever, unless the prosecutor had so consented. The witnesses were so examined before the lord president of the court of session.

It is a matter of course in aid of a trial at law to apply to a court of equity for a commission and injunction in the meantime: and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff (a). Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere, for the King in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal is accountable only to God and his own conscience: that he is absolutely despotie, and can spoil, plunder, and affect his majesty's subjects, both in their liberty and property with impunity, is a doctrine that cannot be maintained.

In Lord Bellamont's case, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted because the Attorney-General was to defend it on the part of the King; which shows plainly that such an action existed. And in Way v. Yally, 6 Mod. 195, Justice Powell says, that an action of

(a) And now, by st. 1 W. 4, c. 22, courts of common law can order the examination of witnesses to be taken in writing whether they reside in a foreign country, a colony, or in England, but under circumstances which disable them from attending to give evidence. See *Doe* v. *Pattison*. 3

Dowl. 35; Bain v. De Vetrie, 3 Dowl. 517; Bridges v. Fisher, 1 Bing. N. C. 512; Prince v. Samo, 4 Dowl. 5; Bourdeaux v. Rove, 1 Bing. N. C. 721; Dukett v. Williams, 1 Tyrwh. 502; Wainwright v. Bland, 3 Dowl. 653. [And see now, since the Judicature Act, O. 37, r. 5 et seq.]

false imprisonment has been brought here against a governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly showed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried. — I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a courtmartial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who follow the train are not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave 500l. damages.

The next objection which has been made is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is, where the proceeding is in rem, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise; as in the case alluded to by Serjeant Walker: if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the

peace of the king (a): but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial: for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county the place is not material; and if an imprisonment in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular Acts of Parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at West-

(a) It seems that the words contrapacem were not necessary in a declaration of trespass even before the Common Law Procedure Amendment Act, 1852, for the fine to the king had been abolished, and though in Day v. Muskett, L. Raym. 985, Lord Holt said that it was not the contra-pacem, but the vi et armis, that may now be omitted, yet quare whether they can be held to stand on a different footing, see Com, di. Pleader, 3 M. S. and whether the doubt expressed by Lord Mansfield be well founded, see post, in notis.

minster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the stat. 6 Rich. 2. But I do not put the objection upon that statute. I rest it singly upon this ground: if the true date or description of the bond is not stated, it is at variance. But the law has in that case invented a fiction; and has said the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial by a videlicet, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz., in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted (a). Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the case shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice and to make the writ appear right in form. But where the true time of suing out a latitat is material, as on a plea of non assumpsit infra sex annos, there it may be shown that the latitat was sued out after the six years, notwithstanding the teste. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. I will mention a case or two to show that this is the meaning of it.

In 6 Mod. 228, the case of *Roberts* v. *Harnage* is thus stated: The plaintiff declared that the defendant became bound to him

⁽a) Cited by Bramwell, B., A.-G. v. Kent, 31 L. J. 396; Holmes v. Reg. 31 L. J. Cha. 58.

at Fort St. David's in the East Indies at London, in such bond; upon demurrer the objection was that the bond appeared to have been sealed and delivered at Fort St. David's in the East Indies, and therefore the date made it local, and, by consequence, the declaration ought to have been of a bond made at Fort St. David's in the East Indies, viz., at Islington in the county of Middlesex; or in such a ward or parish in London: and of that opinion was the whole court. This is an inaccurate statement of the case. But in 2 Lord Raym. 1042, it is more truly reported, and stated as follows: it appeared by the declaration that the bond was made at London in the ward of Cheap; upon over, the bond was set out, and it appeared upon the face of it to be dated at Fort St. George in the East Indies; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court said that it would have been good if laid at Fort St. George in the East Indies, to wit, at London, in the ward of Cheap. The objection there was, that they had laid it falsely; for they had laid the bond as made at London; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from Latch, and a case from Lutwyche, on the former argument, but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of Parker v. Crook, 10 Mod. 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George, in the East Indies: and upon the over of the deed it bore date at Fort St. George, and therefore the court, as was pretended, had no jurisdiction: Latch, fol. 4, Lutwyche, 950. Lord Chief Justice Parker said, that an action will lie in England upon a deed dated in foreign parts; or else the party can have no remedy: but then in the declaration a place in England must be alleged pro formâ. Generally speaking, the deed upon the over of it. must be consistent with the declaration: but in these cases, propter necessitatem, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a vovage which was to be performed from Fort St. George to Great Britain, does import that Fort St. George is different from Great Britain; and after taking time to consider of it in Hilary term, the plaintiff had his judgment, notwithstanding the objection. Therefore, the whole amounts to this: that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county, matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts which follow the persons, but for injuries done by subject to subject; especially for injuries, where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offences on the high seas where it is of necessity to lay in the declaration that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice Lee, and another before me, in which I quoted that determination, to show that when the lords commissioners of prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration that the ship was taken, or seized on the high seas, videlicet, in Cheapside. But it cannot be seriously contended that the judge and jury who try the cause fancy the ship is sailing in Cheapside; no, the plain sense of it is that, as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a venue: which is saying no more than that the party prays the action may be tried in London. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies, and they are very strong authorities. Serjeant Glynn said, that the defend-

ant, Mr. Verelst, was very ably assisted; so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; vet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, You shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in England would be local actions; I remember one, I think it was an action brought against Captain Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some suttlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the suttler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of Skinner and the East India Company was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice Eyre, where he overruled the objection; and I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature: but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of Equity Lord Hardwicke had directed satisfaction to be made in damages: that case before Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous; but I quote it for this

reason—a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me: which was the case of Admiral Palliser. There the very gist of the action was local; it was for destroying fishing-huts upon the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However, the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by any of the king's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shows, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the king's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award. But as to transitory actions there is not a colour of doubt, that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

Per Cur. Judgment affirmed.

It is very curious and instructive to trace the progress of the English law, respecting the locality of actions [though the Judicature Act, 1873, renders

the subject of small practical importance so far as regards the question of venue].

During the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, videlicet, their personal acquaintance with the parties and the merits of the cause; and few rules of law were enforced with greater strictness than those which required that the venue, visne, or vicinetum, in other words the neighbourhood whence the juries were to be summoned, should be also that in which the cause of action had arisen; in order that the jury who were to determine it principally from their own private knowledge, and who were liable to be attainted if they delivered a wrong verdict, might be persons likely to be acquainted with the nature of the transaction which they were called upon to try. Peregrina judicia, says a law of Henry the First, modis omnibus submovemus.

In order to effect this end, the parties litigant were required to state in their pleadings with the utmost certainty, not merely the county, but the very venue, i.e. the very district, hundred or vill, within that county, where the facts that they alleged had taken place, in order that the sheriff might be directed to summon the jury from the proper neighbourhood, in case issue should be taken on any of such allegations. It followed, of course, that a new venue was designated as often as the allegations of the parties litigant shifted the scene of the transaction from one part of the country to another.

This was, however, soon found to produce great inconveniences; for in mixed transactions, which may happen partly in one place, and partly in another, it was extremely difficult to ascertain the right venue; and as the number of these transactions increased with increasing civilisation, these difficulties about determining the place of trial became of constant occurrence, and soon induced the courts, in order to relieve themselves, to take a distinction between transitory matters, such as a contract which might happen anywhere, and local ones, such as a trespass to the realty, which could only happen in one particular place; and they established as a rule, that in transitory matters the plaintiff should have a right to lay the venue where he pleased, and the defendant should be bound to follow it, unless indeed his defence consisted of some matter in its natural local, and which must therefore, ex necessitate rei, be alleged to have taken place where it really happened.

However, this distinction was soon abused by litigious plaintiffs, who, by laying the venue in a county distant from the defendant's residence, obliged him to come thither with his witnesses; Gilb. C. P. 89; and this occasioned a return to the ancient strictness with regard to venues expressed in the above law of Henry the First. Accordingly by stat. 6, Richard 2, cap. 2, it was enacted that, "to the intent that writs of debt, and account, and all other such actions be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same actions did arise, that if, from henceforth, in pleas upon the same writs it shall be declared that the contract thereof was in another county than is contained in the original writ, that then the said writ shall be utterly abated:" and, as the words of this statute were found not quite sufficient to effect the object, statute 4 Henry the Fourth, c. 18, directed that attorneys should be sworn "that they would make no suit in a foreign county."

After these statutes the judges adopted various means of enforcing their provisions. At first they examined the plaintiff on oath, as to the truth of the *venue*; afterwards they allowed the defendant to traverse it and try it

in an issue, Rastell. Debt. 184, b. Fitz. Abr. Brief 8, and still later they made a rule of court, rendering it highly penal on attorneys to transgress the act of Hen. 4; R. M. 1654, pl. 5, K. B.; M. 1654, pl. 8, C. P.; but finding that the mode of traversing the venue produced great delay, they at last adopted the mode of changing it on motion, which [continued in use until the Judicature Act, 1873, which will be referred to below, came into force].

But all these alterations in the law applied, it must be borne in mind, only to transitory matters, for where a matter alleged in pleading was of a local description, whether the allegation happened in a declaration or in any subsequent pleading, the renue for the trial of such matter could be nowhere but at the very place where it was alleged in pleading to have happened, and therefore, as is observed in the text, "even in cases the most transitory, if the cause of action was laid in London, and there was a local justification as at Oxford, the cause must have been tried in Oxford, not in London." Acc. Ford v. Brooke, Cro. Eliz. 261; Bowyer's Case, Moore, 410.

And it was probably this strictness of the law with regard to *venue* which rendered it necessary to confine the defendant so long to a single plea, since had he pleaded several pleas on which issues had been taken triable by different *venues* there could have been no single trial of the action; and accordingly we find that it was not till after the effect of the statute of Charles the Second on *venues* had become well settled, that the very same year which put an end to the last remnant of the old severity, by abolishing the necessity of summoning hundreders, also endowed the defendant with a right which he ought in justice always to have possessed, of stating everything in his defence which can by law be made available to exonerate him; the right corresponding to which, that, namely, of replying to the defence everything which has a direct tendency to rebut it, was, even in our more advanced times, denied the plaintiff, until the passing of the Common Law Procedure Amendment Act, 1852, s. 81.

But to return to the progress of the law of *venue*, stat. 16 & 17 Car. 2, c. 8 (one of the statutes of Jeofails), enacted, "that after judgment no verdict shall be arrested or reversed, for that there is no right *venue*, so as the cause of action were tried by a jury of the proper county or place *where the action was laid.*"

Considerable difficulty arose on the construction of this statute, many lawyers contending that the words "the proper county or place where the action is laid" must be understood to mean the proper county or place where the issue arises, so that if the issue arose at Dale in Oxfordshire, and the renue was Sale in the same county, here they said was a case within the statute, there being a right county but a wrong renue. However, it was at length decided, in Craft v. Boile, 1 Saund. 246, b, contrary to the opinion of Twysden, J., and was settled by many subsequent cases, that the words "where the action was laid" mean, where it was laid in the declaration, not in any subsequent pleading. And accordingly it [was ever afterwards held] sufficient if the jury [were] summoned from the venue laid in the declaration.

This venue indeed was at that time the vill or hundred where the cause of action was stated in the declaration to have arisen; and anciently the jury, in order that they might be persons well acquainted with the controversy, were summoned out of the very hundred designated for the venue. Afterwards the rule was relaxed, and in the reign of Edward the Third, it was sufficient if the jury contained six hundreders. Gilb. C. P. c. 8. This number was in Henry the Sixth's reign reduced to four; Fortescue de Laud. c. 25; it was

afterwards, by stat. 35 Hen. 8, c. 6, restored to six; stat. 27 Eliz. c. 6, reduced it to tivo; and so the law remained till long after the stat. 16 & 17 Car. 2, c. 8, after which act it was still necessary that tivo at least of the jurors should be summoned from the hundred laid in the declaration; and if there were not so many, it was cause of challenge. But this last remnant of the ancient strictness was abolished by 4 & 5 Anne. c. 6, except so far as concerned actions founded upon penal statutes, to which the abolition was extended by 24 G. 2, c. 18. So that [thenceforth it was] in all cases sufficient if the jury [were] summoned de corpore comitatus, i.e., from the body of the county in which the venue [was] laid by the declaration.

It has been already mentioned that in transitory actions the judges adopted various modes of enforcing the policy of the statute of Richard the Second, and obliging the plaintiff to lay his renue where the transaction in dispute had really occurred. At last they had recourse to a practice, which seems to have been first introduced in the reign of James the First, per Holt, C. J., 2 Salk. 670; (the first case in the books is Lord Gerrard v. Floyd, 1 Sid. 185, E., 16 Car. 2.) founded upon the equity of that enactment, by which they held themselves authorised, upon affidavit made that the cause of action, if any, arose in the county of A., and not in the county of B., in which the venue was laid, or elsewhere out of the county of A., to change the venue to the county of A., and the motion for so doing was of course, only requiring counsel's signature. R. H. 2 W. 4, pl. 103. But as it would be hard to conclude the plaintiff on the single affidavit of the defendant, it was further held, that the venue must be brought back, if the plaintiff undertook to give material evidence in the county in which the action was brought, failing which he must have been non-suited, which was equivalent to an abatement of the writ, according to the statute, Gilb. C. P. 90; Santler v. Heard, 2 Bl. 1032, 1033; Burckshaw v. Hopkins, Cowp. 410; Watkins v. Towers, 2 T. R. 275.

There were many cases of transitory actions in which the defendant could not by possibility make the above [common] affidavit, [but could procure a change of *venue* on a special affidavit in the interests of justice. See Tidd's Prac. 605].

By the rules of Hilary Term, 1853, all former written rules of practice [were] abolished, and the only rule substituted relating to *venue* [was] the 18th which [was] that "No *venue* can be changed without a special order of the court or judge unless by consent of the parties."

[By 3 & 4 W. 4, c. 42, s. 23, power was given to the court or a judge to alter the *venue* in certain cases, even in local, as distinguished from transitory actions, and this power was further enlarged by the C. L. P. Act, 1852, §§ 41, 182.

As to the right of the Crown in transitory but not in local actions, to lay and retain the *venue* where it pleases, see *Attorney-General* v. *Lord Churchill*, 8 M. & W. 171; and as to similar rights in the Attorney-General for the Prince of Wales, see *Attorney-General to the Prince of Wales* v. *Crossman*, L. R. 1 Exch. 381, and the cases therein cited. As to the right of the Crown under 28 & 29 Vict. c. 104, s. 46, to change the *venue* in certain cases as of right, see *Dixon* v. *Farrar*, 18 Q. B. D. 43.

An attorney suing in person had, before the Judicature Act, 1873, the privilege to lay and retain the *venue* in Middlesex, and the court had no power to change it. *Grace* v. *Wilmer*, 26 L. J. Q. B. 1.

The law on this subject is now contained in the Judicature Acts, 1873 (36 & 37 Vict. c. 66), and 1875 (38 & 39 Vict. c. 77), and the rules made in pursu-

ance of those acts. By Order 36, Rule 1, it is provided as follows: "1. There shall be no local *venue* for the trial of any action, except where otherwise provided by statute. Every action in every division shall, unless the court or a judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the defendant, or his solicitor, within six days after appearance. Where no place of trial is named, the place of trial shall, unless the court or a judge shall otherwise order, be the county of Middlesex." See as to this rule, *Locke v. White*, 33 Ch. D. 308.

Quare whether, notwithstanding the qualification recept where otherwise provided by statute," introduced above since the Rules of 1875, the effect of s. 33 of the Judicature Act, 1875, Order 36, Rule 1, above stated, and s. 6 of the Statute Law Revision and Civil Procedure Act, 1883, may not be to repeal all statutory provisions for local venues.

By rule 1a, of the same order, it is provided that the provisions of Rule 1 shall apply to every action, notwithstanding that it may have been assigned to any judge.

In deciding upon applications to change the place of trial, the courts will, no doubt, be governed to a great extent by the same principles as governed the practice previously to the Judicature Act, on motions to change the renne. In Church v. Barnett, L. R. 6 C. P. 116, Willes, J., stated the true rule to be that a plaintiff had the right to lay his venue where he thought proper. If he did so capriciously a judge would change the venue to the place where the cause of action arose. But where he had not exercised a capricious choice, the defendant who sought to deprive him of an undoubted right must show that there would be a practical preponderance of convenience in trying the cause in the place where the cause of action arose. The same doctrine as to the preponderance of convenience was laid down in Helliwell v. Hobson, 3 C. B. N. S. 761; Durie v. Hopwood, 7 C. B. N. S. 835, the places where the contract was made and where the breach took place being also elements for consideration, Levy v. Rice, L. R. 5 C. P. 119. The court would not in general interfere with an order to change the venue made by a judge at chambers, unless he acted on a misconception of the facts, Schuster v. Wheelright, 8 C. B. N. S. 383; see Jackson v. Kidd, 29 L. J. C. P. 221; Church v. Barnett; Levy v. Rice, ubi sup., and Schroder v. Myers, 34 W. R. 261, decided in the C. A. since the Judicature Acts.

In Green v. Bennett, 54 L. J. Ch. 85, and Powell v. Cobb, 29 Ch. D. 486, 54 L. J. Ch. 962, which were actions in the Chancery Division since the Judicature Acts, the question was treated as one for the discretion of the judge to whom the actions were assigned as to the preponderance of convenience. But where Bacon, V.-C., made an order changing the place of trial to London, on the ground merely that the action was brought in the Chancery Division, the C. A. set aside the order. Philips v. Beale, 26 Ch. D. 621; 54 L. J. Ch. 80. In Powell v. Cobb (sup.), Pearson, J., seems to intimate that the place of trial cannot be changed on the application of the plaintiff. The C. A. express no opinion on this point.

To turn now from the technical rules respecting the *venue* or place of trial to more substantial doctrines with regard to causes of action arising abroad. "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of

action altogether, namely, those which would be local if they arose in Eng-

land, such as trespass to land; and even with respect to those not falling within that description, our courts do not undertake universal jurisdiction." *Phillips* v. *Eyre*, per Willes, J., L. R. 6 Q. B. 1, 28; *Doulson* v. *Matthews*, 4 T. R. 503.

To some extent, no doubt, the difficulty as to local actions, such as trespass to lands abroad, being tried in our courts, arose merely from technical rules as to the necessity in such cases for a local *renue* as distinguished from any inherent want of jurisdiction in our courts to try them. (See the judgment in the principal case.) And it may be a question how far the effect of the Judicature Act, 1873, abolishing every local *venue*, is not to get rid of this disability, especially where the parties are domiciled in England; see *per* Lord Cairus, C., Whitaker v. Forbes, 1 C. P. D. 51.

But there are broader grounds on which our courts decline jurisdiction, sometimes altogether, sometimes perhaps when the parties are aliens, and there is, therefore, no jurisdiction founded upon the *lex domicilii*.

Thus our courts would refuse to entertain any proceedings where the property is real and situate abroad, such as ejectment (see the observations of Lord Mansfield in the judgment in the principal case, *Graham* v. *Massey*, 23 Ch. D. 743) or a bill for partition, *Carteret* v. *Petty*, 2 Swab. 323 n., and this, whether the parties be aliens or domiciled in England.

And though in some cases the Courts of Equity have entertained suits affecting lands beyond the jurisdiction (as by decreeing specific performance of articles concerning boundaries of provinces in America, Penn v. Lord Baltimore, 1 Ves. 444, 2 Tudor's L. C. in Eq. 923; or by a foreclosure decree of a mortgage of land situate abroad, Toller v. Carteret, 2 Vern. 494; Payet v. Ede, L. R. 18 Eq. 118), this exceptional jurisdiction is exercised only by reason of the authority of the court in personam, and, as it seems, where there is privity between the parties arising by reason of a contract made within the jurisdiction, Norris v. Chambers, 29 Beav. 246, affirmed 3 D. F. & J. 583; Cookney v. Anderson, 31 Beav. 452, 1 D. J. & S. 365; Norton v. Florence Land Co., 7 Ch. D. 332; see also Re Holmes, 2 J. & H. 527; Blake v. Blake, 18 W. R. 944; Reiner v. Marquis of Salisbury, 2 Ch. D. 378, 45 L. J. Ch. 250, in which last case Malins, V.-C., refused to entertain a bill for discovery in aid of proposed proceedings to recover land in India.

On the other hand, speaking generally, (and subject to the distinction before mentioned in respect of local actions,) where the action is in personam, whether in respect of a contract or of a tort, our courts will, it is apprehended, entertain it, though it may have arisen abroad, and though the parties to it may be aliens, provided that service of process is effected according to their rules. See Story's Conflict of Laws, 542–543; Wharton's Conflict of Laws, 2nd ed. 743; Phillimore Priv. Int. Law, 701; Buenos Ayres Railway Co. v. Northern Railway Co. of Buenos Ayres, 2 Q. B. D. 210, 46 L. J. Q. B. 224.

As regards contractual obligations, however, a distinction has been taken, that where the contract is made abroad, and its subject-matter is abroad, an English court will not entertain a cause of action in respect of it, if the parties be aliens, though it would do so if they were domiciled here. See Matthei v. Galitzin, L. R. 18 Eq. 340, and the judgment of the Master of the Rolls in Cookney v. Anderson, 31 Beav. 466, which judgment was affirmed, 1 D. J. & S. 365. Quære, whether the dicta in the last cited cases are not too wide. In Doss v. Secretary of State for India, L. R. 19 Eq. 535, Malins, V.-C., approves of and follows Matthei v. Galitzin.

In Hart v. Herwig, L. R. 8 Ch. 860; 42 L. J. Ch. 457, the plaintiff, an Englishman, made at Hamburg an agreement with the defendant Herwig, domiciled at Hamburg, for the sale by Herwig, to the plaintiff, of a Hamburg ship then on voyage, to be delivered to the plaintiff at any place whither she might be ordered for discharge, the seller making allowance if she arrived in a damaged state. The ship was ordered to Sunderland to discharge, but on arrival, delivery was refused except on payment of the full price. The Lords Justices affirmed an order of Malins, V.-C., restraining the removal of the ship by the defendant Herwig, and the master, who was also made a defendant. Sir Wm. James, L. J., said "The substantial question is, whether this Court has power to prevent a specific chattel from being removed out of the jurisdiction until a question relating to that chattel is decided. I am of opinion that, according to the established law of nations, if this suit were a suit for damages only, or one which could result in damages only, then the plaintiff must, in order to enforce his claim for damages, go and seek the forum of the defendant. But where the contract, as in this case, though made abroad, is to deliver a thing in specie in this country, and the thing itself is brought here, then the court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered."

It is presumed that Lord Justice James in saying that, if the suit was a suit for damages only, then the plaintiff must seek the forum of the defendant, is speaking of a case in which there had been no service of process within the jurisdiction, and that the necessity would arise from this, and not from any inherent lack of jurisdiction in our courts to try such a case, if service of process had been effected. See the judgment of Lord Justice Mellish. As to service of process, see *post*, p. 669.

But as in the case of torts, so also in the case of contracts, our courts will not enforce contracts illegal, according to English, though legal according to the law of the place where they are made: Santos v. Illidge, 6 C. B. N. S. 841, which decision was reversed in error, 8 Id. 861, but on the ground that the contract sought to be enforced was not prohibited by English law. See also Grell v. Levy, 16 C. B. N. S. 73; Hope v. Hope, 26 L. 9. Ch. 417.]

As regards torts, there seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary (see *ante*, p. 650), seems to be erroneous. [See "The Halley," L. R. 2 P. C. 193, 37 L. J. Adm. 33.

But to found a cause of action between aliens, or between aliens and British subjects, or between British subjects in an English court for a wrong committed abroad, both these conditions must be fulfilled. See the judgment in Phillips v. Eyre, L. R. 6 Q. B. 1, 40 L. J. Q. B. 28, and "The Maria Moxham" in C. A., 1 P. D. 107, 45 L. J. Prob. 36, and per Lord Esher, M. R., Chartered Mercantile Bank of India v. Netherlands India Steam Narigation Company, 10 Q. B. D. at p. 536 (who, however, holds that "for a tort committed on the high seas between two foreign ships an action can be maintained in this country although it is not a tort according to the laws of the courts in the foreign country to which the ships belong"). Thus in the case of "The Halley," sup., the Judicial Committee of the Privy Council reversing the decision of the Court of Admiralty pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision

caused by the act of a pilot, whom the shipowner was compelled by that law to employ, and for the act of whom therefore, as not being his agent, he was not responsible by English law.

And conversely, in *Phillips v. Eyre*, sup., the Court of Exchequer Chamber upheld the decision of the Queen's Bench that no action could be maintained in an English Court in respect of an assault and imprisonment which had been rendered lawful in Jamaica, where the alleged acts took place, by an Act of Indemnity. That historical case is a remarkable exemplification of the doctrine of English law now under discussion; because it is thereby solemnly decided in the words of Cockburn, C. J., that "the principle that an act authorised by the law of the country in which it takes place, cannot be the subject of a legal proceeding here, is equally applicable to an act originally wrongful but legalised by an *ex post facto* law" of the foreign country.

It was an action brought by an inhabitant of Jamaica against the defendant, who had been governor of that island, for an assault and false imprisonment; and the acts complained of took place during the rebellion in that island in the year 1865. The defendant pleaded an Act of Indemnity passed by the Jamaica Legislature, to which plea the plaintiff demurred. On the argument a number of objections were urged against the plea, and *inter alia*, that such an act could not take away the plaintiff's right of action in this country.

The Court of Queen's Bench, and, on appeal, that of Exchequer Chamber, unanimously decided in favour of the defendant. In delivering the judgment of the latter court, Willes, J., says (p. 28 of L. R.): "A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place, and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but primâ facie it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong. . . . Where an obligation ex delicto to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided."

As to ex post facto legislation, see also Rouquette v. Overmann, L. R. 10 Q. B. 536; 44 L. J. Q. B. 221.

Again, in "The Maria Moxham," 1 P. D. 107, 45 L. J. Prob. 36, which was a cause of damage instituted by an English company against the owners of an English ship to a pier belonging to the company, but situate in a Spanish port, the Court of Appeal, overruling the decision of Sir R. Phillimore, upheld an alleged defence that if the collision was caused by negligence, it was negligence of the master and mariners of the ship, and that by the law of Spain the owners were not in such a case liable. In this case any objection to the jurisdiction of the English court was waived. See also Scott v. Seymour, 1 H. & C. 219; The Submarine Telegraph Co. v. Dickson, 15 C. B. N. S. 759; 33 L. J. C. P. 139; Hart v. Gumpach, L. R. 4 P. C. 439; 42 L. J. P. C. 25. The Mali Ivo, L. R. 2 A. & E. 356; 38 L. J. Adm. 34.

The foregoing remarks as to the capacity of the English courts to take cognisance of actions against foreigners must be taken, subject to the qualification, that to give an English court jurisdiction in personal actions there must be service of its process within the jurisdiction, or in certain cases service or notice in lieu thereof without the jurisdiction, as provided for under the Judicature Acts by the rules in Order XI. This is of course a technical question, totally distinct from the broader one discussed in these notes, as to the capacity of English courts to take cognisance of foreign causes of action.

As to the jurisdiction of our courts over a chattel when brought to this country, see *Hart* v. *Herwig*, L. R. 8 Ch. 860, 42 L. J. Ch. 457.

A special jurisdiction has sometimes been exercised by the Admiralty Division over foreign ships at the request of the representative of the state to whose subjects such ships belong. See "The Agincourt," 2 P. D. 239, "The Evangelistria," Id. 241, 46 L. J. P. D. & A. 1.

As to the limits of the Crown's jurisdiction not extending beyond low water mark, see Reg. v. Keyn, 2 Ex. D. 63; 46 L. J. M. C. 17; Harris v. Owners of "Franconia," 2 C. P. D. 173; 46 L. J. C. P. 363, and 41 & 42 Vict. c. 73.

As to when a foreigner can be made a bankrupt in England, see ex parte Crispin, L. R. 8 Ch. 374; 42 L. J. Bank. 65.

As to when bankruptcy proceedings can be served on a foreigner, see exparte Pascal, 1 Ch. D. 509; Exparte Blain, 12 Ch. D. 522. All these three cases were decided under the Bankruptcy Act, 1869.]

Locus regit actum is a canon of general jurisprudence, and must be assumed in the absence of contrary evidence to hold good in every system of law. Guepratte v. Young, 4 De G. & S. 217.

[For recent applications of this maxim see Cammell v. Sewell, 5 II. & N. 728, where a sale in Norway of goods there, abandoned to English underwriters, was upheld as valid by Norwegian though invalid by English law; Munroe v. Pilkington, 2 B. & S. 11; Dent v. Smith, L. R. 4 Q. B. 414; Messina v. Petrocochino, L. R. 4 P. C. 144; Castrique v. Imrie, L. R. 4 H. L. 414; 39 L. J. C. P. 350; Godard v. Gray, L. R. 6 Q. B. 139; 40 L. J. Q. B. 62, cases in which foreign judgments have been enforced, though the cases would have been decided otherwise according to English law. In Simpson v. Fogo, 1 H. & M. 195; 32 L. J. Ch. 249, Wood, V.-C., declined to enforce a decree of a court of Louisiana, acting in defiance of British law and the comity of nations. Compare with this case Liverpool Marine Credit Co. v. Hunter, L. R. 3 Ch. 479.

In a contract by charter-party the law of the flag as a general rule prevails, Lloyd v. Guibert, L. R. 1 Q. B. 115; and the same law governs the right of a shipmaster to bottomry his cargo, "The Gaetano and Maria," 7 P. D. 137; but this is only primâ facie, and the whole circumstances must be looked at to see what was the intention of the parties, Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co., 10 Q. B. D. 521, and see Moore v. Harris, 1 App. Cas. 331. On the question whether our courts recognise a "general maritime law," distinct from the law of this country, see Lloyd v. Guibert, sup., "The Patria," L. R. 3 A. & E. 436; "The Gaetano and Maria," ubi sup.; "The Leon," 6 P. D. 148.]

With respect to transitory causes of action which have accrued abroad, like that in the principal case of *Mostyn v. Fabrigas*, it must be remarked that although the courts of this country will entertain them, still they will, in adjudicating on them, be governed by the laws of the country in which they

arose for in the case of contracts, by the law with reference to which the parties may be presumed to have contracted, Lloyd v. Guibert, 35 L. J. Q. B. 74; 6 B. & S. 100; Smith v. Weguelin, L. R. 8 Eq. 198; ex parte Holthausen, L. R. 9 Ch. 722, per Mellish, L. J.; Cohen v. S. E. R. 2 Ex. D. 253, 46 L. J. Ex. 417; De Greuchy v. Wills, 4 C. P. D. 362; Adams v. Clutterbuck, 10 Q. B. D. 403; 52 L. J. Q. B. 609; Chartered Merc. Bink v. Netherlands Steam Navigation Co., ubi sup. On the latter point the broad rule is that the law of a country where a contract is made presumably governs the nature of the obligation and the interpretation of it unless the contrary appears to be the express intention of the parties, per Lord Esher, M. R., Jacobs v. Crédit Lyonnais, 12 Q. B. D., at p. 600; Chamberlain v. Napier, 15 Ch. D. 614, in which case, Hall, V.-C., held that such an intention did appear]. The distinction laid down in all cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure which must be adopted as it happens to exist in the country where the action is brought.

[This distinction is illustrated by the decisions which have been given in our courts as to the liabilities and rights of parties to and holders of bills of exchange drawn, accepted, and indersed in different countries, and by the enactment in the Bills of Exchange Act, 1882, s. 72 (set forth *post*, p. 676), which presumably was intended to embody the effect of those decisions.]

Thus in *Trimbey* v. *Vignier*, 1 Bing. N. C. 151, it was held [on the assumption] that by the law of *France*, an indorsement in blank does not transfer any property in a bill of exchange [or promissory note that] the holder of a [note made] in *France* and *there* indorsed in blank cannot recover upon it in this country against the [maker.

And although in *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473, (better reported 39 L. J. C. P. 254,) the Court of Exchequer Chamber declined to follow *Trimbey* v. *Vignier*, it was on the express ground that in the latter case the court had mistaken the French law, and that according to French law a blank indorsement acted as a procuration, that is to say, did convey a right to sue, though subject to the equities affecting the indorser in blank.

On the other hand, in Lebel v. Tucker, L. R. 3 Q. B. 77, it was held that in the case of a bill of exchange drawn, accepted, and payable in England, the acceptor was liable to a holder after indorsement in France under similar circumstances to those in Trimbey v. Vignier: though the court assumed the French law to be as stated in Trimbey v. Vignier, distinguishing the case on the ground that the contract of the English acceptor of an English bill must be governed by English law. They at the same time declined to express any opinion as to what would be the effect of such an indorsement as between the indorser and any subsequent indorsee in an action against the indorser himself.

The case of Bradlaugh v. De Rin (sup.) was intermediate between Trimbey v. Vignier and Lebel v. Tucker. In the report of the case in the Common Pleas it is stated both in the report and in the judgment, that the bills sued upon were drawn in France: see L. R. 3 C. P. 538. In the report in the Exchequer Chamber (sup.) it is stated that they were drawn in Belgium; but in that court, as in the court below, it appears to have been assumed that the bills were in their inception French bills. They were accepted in England, but afterwards indorsed in France in blank, and it was assumed in the Court of Common Pleas that by French law such an indorsement was insufficient to give the holder—the plaintiff—a title to sue the acceptor—the defend-

ant. The majority of the Court of Common Pleas, consisting of Bovill. C. J., and Willes J., held that under such circumstances, the bills being French bills in their inception, the obligations of the acceptor must be determined by French law. Montague Smith, J., on the other hand, held that the acceptance having been in England the English law must prevail. The Exchequer Chamber, without impugning the correctness of the decision below in point of law, reversed the judgment on the ground that as a mother of fact by French law the indorsement was sufficient.

In In ve Marseilles Co., 30 Ch. D. 598, 55 L. J. Ch. 116 decided since the Bills of Exchange Act, 1882, but without reference to it, presumably because the bills were accepted before the passing of the Act . it was held by Pearson, J., that the holders of a bill drawn in France but accepted by an English company in England, were entitled to recover against such acceptors though the indorsement might have been invalid by the law of France where it was made. In this case the learned judge laid stress upon the form of the bill as constituting it an English instrument. Another case decided on the subject before the Bills of Exchange Act, 1882, is Allen v. Kemble, 6 Moo. P. C. 315, in which case Lord Kingsdown states it as admitted that in the case of a bill drawn in one country upon a drawee in another, "the drawer is liable according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn." See the explanation, however, of this case by Cockburn, C. J., in Rouquette v. Overmetan, L. R. 10 Q. B. at p. 540, where it is pointed out that the above evetom was unnecessary to the decision of the case, which turned upon the question whether the defendant in a Demerara court could avail himself of the Demerara law as to set-off, a question upon which the ber fori must prevail, whatever might have been the law governing the contract of the drawer, the defendant in the action. See also McFarlane v. Norris, 31 L. J. Q. B. 245.}

In Gibbs v. Fremont, 9 Exch. 25, the holder of a dishonoured bill drawn at Ciudad de los Angeles in California upon Washington, was held entitled as against the drawer to Californian interest.

In Rouquette v. Overmann, L. R. 10 Q. B. edecided before the Act of 1882. at p. 536, the court discuss the supposed rule "that although the obligations of the acceptor may be determined by the lex toci of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn." "It is unnecessary," says Cockburn, C. J., "to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment, in order to enable the holder to have recourse to an antecedent party to the bill." His lordship then points out that the party transferring a bill for value "engages as surety for the due performance by the acceptor of the obligation which the acceptor takes on himself by the acceptance. His liability therefore is to be measured by that of the acceptor whose surety he is, and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety." The effect of the decision is that the court, following Rothschild v. Carrie, 1 Q. B. 43 (though the reasoning of the court in that case has been disapproved, see Horne v. Rouquette, 3 Q. B. D. 514, and Hirschfield v. Smith, L. R. 1 C. P. 340, held that notice of dishonour according to English law was not necessary, but that notice according to French law was sufficient

to charge the defendants who were Manchester merchants, at the suit of the plaintiff, an English subject carrying on business in London, on a bill drawn and indorsed to the plaintiff by the defendants in England, but upon and accepted and dishonoured by a French firm at Paris. The state of facts was that the time for payment of the bill with all other French bills was, during its currency, from time to time extended by the French Government in consequence of national complications, and the Court of Queen's Bench held that the drawer was equally with the acceptor entitled to the benefit of these extensions, and so that the time for giving notice of dishonour only arose when the acceptor failed to fulfil the obligations imposed upon him.

Another qualification of the supposed rule (irrespective of the Bills of Exchange Act, 1882) that the liability created by an English indorsement is to be measured simply by English law, is to be found in Horne v. Rouquette, 3 Q. B. D. 514. In that case a bill was drawn in England by Bryant, Foster, & Co., on Chasserot in Spain, in favour of the defendant, who indorsed it in England to the plaintiff. The plaintiff wrote his name on the back and forwarded it to one Monforte, in Spain, who placed it to his credit under circumstances which the majority of the court held to constitute an indorsement to Monforte in Spain. Monforte indorsed it in Spain to Clavero, who indorsed it also in Spain to O'Connor & Sons. On presentment by them for acceptance the bill was dishonoured. Notice of dishonour was not given to the plaintiff until after such a time as would in England have discharged him; but it was proved that according to Spanish law, no notice of dishonour for non-acceptance was required. The plaintiff when he did receive notice at once gave notice to the defendant, and paid Monforte: and was held by the Court of Appeal, affirming the judgment of Lord Coleridge, C. J., to be entitled to recover against the defendant. The court concurred in thinking that the fact of the bill being a foreign one was immaterial, that the liability of the defendant on his indorsement in England was governed by English law; but that the plaintiff, being liable to Monforte, because, according to Spanish law, no notice of dishonour was necessary to charge the indorser, was entitled in his turn to have recourse against the defendant.

The ratio decidendi seems to be that a defendant, though indorsing in England, and whether the bill be foreign or English, must be deemed to anticipate the possibility of a subsequent foreign indorsement, and to undertake to indemnify his indorsee against any liability he may incur by reason of such later indorsement, though some of the links in the chain of indorsements subsequent to his own may not be such as would bind the defendant if the indorsement had been English.

The ratio decidendi which had been indicated above with reference to Horne v. Rouquette, or one founded on an analogous train of reasoning, is suggested by Wills, J., in Lee v. Abdy, 17 Q. B. D. 309, as applicable to the question of the liability of an English acceptor upon a bill indorsed abroad, and as explaining Lebel v. Tucker and Bradlaugh v. De Rin, supra. Quære whether the learned judge in suggesting that the liability of the acceptor is to be measured by reference to what he must have contemplated would be the probable place of indorsement gave sufficient weight to the fact that in Bradlaugh v. De Rin the bill was treated by the majority of the court below as a foreign bill, and the Court of Exchequer Chamber, though they do not decide the point, deal with the case on the same assumption. The bill being treated as a foreign bill, the court below held (and the Exchequer Chamber did not impugn that position) that the acceptor would be liable only upon an

indorsement effectual against the drawer by the law of the place of issue. On the other hand, in Lebel v. Two ker. the bill being an English bill, the acceptor's hability was determined only by English law, not because he was taken to have contemplated negotiation in England only, but because that was the law of the place of his contract. In Lee v. Abdy, ubi supra, a Divisional Court consisting of Day and Wills, JJ., held that to an action on a life policy effected in England by the assignee of the policy, it was a defence that the assignment, though valid by English law, was invalid and void by the law of Cape Colony where the assignment was made, and where the assigner and assignee were domiciled.

The court considered that the decision in Label x. Tucker was distinguishable as being on the liability of an acceptor of a bill of exchange which was different from that of the defendants, who were being sued not on a negotiable instrument, but as liable under a policy of insurance.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, provides as follows:—

- "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the part es thereto are determined as follows:
- "(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.
 - " Provided that: --
- "(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.
- "(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- "(2.) Subject to the provisions of this Act, the interpretation of the drawing, indersement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.
- "Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.
- "(3.) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- "(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- "(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

The wording of the Act, however, is not quite clear, and by s. 97, sub-s. 2, it is provided that "the rules of Common Law, including the Law Merchant,

save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and

cheques."]

"The rule," said Tindal, C. J., delivering judgment in the case of *Trimbey* v. Vignier, 1 Bing. N. C. 151, "which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made: the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought."

This distinction was acted on in *The British Linen Company* v. *Drummond*, 10 B. & C. 903, where it was held that the English statute of limitations was a good plea to an action on a Scotch contract which might in *Scotland* have been put in suit at any time within forty years; in *De la Vega* v. *Vianna*, 1 B. & Ad. 284, where the defendant was allowed to be arrested for a debt contracted in Portugal, and for which he could not have been arrested there; in *Alicon* and *another* (provisional syndics of the estate of Beauvain, a bankrupt) v. *Furnical*, 4 Tyrw. 751, where the Court of Exchequer acted on the French law of bankruptcy; and in *Huber* v. *Steiner*, 2 Bing. N. C. 202, in which the whole difficulty was in ascertaining whether the rule of foreign law applied ad valorum contractûs, or ad modum actionis instituendæ.

It was an action on a promissory note; and the question was, whether the French law of prescription formed a defence thereto, the action being brought within the English period of limitation. On behalf of the defendant it was contended that laws for the limitation of suits were of two kinds, those which bar the remedy, and those which extinguish the debt; and the following passage was cited [at p. 211] from Story's Commentaries on the Conflict of Laws: - "Where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself ipso facto, and declare it a nullity after the lapse of the prescribed period, in such a case the statute may be set up, in any other country to which the parties remove, by way of extinguishment." "This distinction," said Tindal, C. J., delivering judgment, "when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case; ' and with such restriction, it does indeed appear but reasonable, that the part of the lex loci contractûs, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded in the foreign country, as the part of the lex loci contractûs, which gives life to and regulates the construction of the contract; both parts go equally ad valorem contractûs, both ad decisionem litis." However, the court, upon examination of the French law of prescription, thought that its effect was not to extinguish the right, but, as in England, only to bar the remedy, and therefore that the defence was in that case unavailable. [See also MacFarlane v. Norris, 2 B. & S. 783; Harris v. Quine, L. R. 4 Q. B. 653, 38 L. J. Q. B. 331; Pardo v. Bingham, L. R. 4 Ch. 735, 39 L. J. Ch. 170; Alliance Bank of Simla v. Carey, 5 C. P. D. 429.]

Supposing the law of a foreign country to be, that a contract is, after a certain time, to be deemed absolutely extinguished, it seems not quite reasonable to say that the removal of the parties out of the jurisdiction, while that time is running, should authorise the courts of this country to consider

it in esse after the period prefixed. The authorities establish, that the law of the country where the contract is made must govern it, and must be looked on as impliedly incorporated with it. Now, if the contract had contained a proviso that it should be absolutely void if not enforced within a certain time, no doubt the English courts would hold it void after the expiration of that time. But what difference can it make that such provisa is implied from the law of the country where the contract was made instead of being expressed in terms? Is it not in both cases equally part of the contract? If, indeed, the rule of the foreign law be, that the contract shall, after the lapse of a certain time, become void, provided that the parties to it continue to reside all that time in the same country, the arrival of the period prefixed or its avoidance will depend on the contingency of their abstaining from absenting themselves; and, if they leave the country, never will arrive at all; and this is, perhaps, what Judge Story intends by the words "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case." For if the law be so framed as to operate up in the case without such residence, the qualification appears to be inapplicable, but see per Lord Brougham, Don v. Lippmann, 5 Cl. & Fin. 1, 16.

The English statute of limitations does not apply to charges on real estate situate abroad, as to which the *lex loci rei site* is the law applicable. *Pitt* v. *Ducre*, 3 Ch. D. 295.

In Lopez v. Burshem, 4 Moore (Privy Council), 300, the same law was acted upon with reference to the limitation of time prescribed for bringing an appeal after condemnation by a vice-admiralty court under the Slave Trade Abolition Act, 5 G. 4, c. 113. It was contended in that case that the owners of the cargo were not bound by the enactment, being foreigners; but the court, admitting that the British parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, held that a British statute may fix a time within which application must be made for redress to the tribunals of the empire: "on matter of procedure," they said, "all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum," and " if a law were made upon this subject working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect." See further Heriz v. Riera, 11 Sim. 318; Cooper v. Lord Waldegrave, 2 Beav. 282; Beaucé v. Muter, 5 Moore (Privy Council), 69; Ferguson v. Fuffe, 8 Cl. & Fin. 121; Leslie v. Baillie, 2 You. & Coll. C. C. 91; Cope v. Doherty, 4 Kay & J. 367, affirmed 2 De G. & J. 614; Jago v. Graham, 32 L. J. Adm. 49; The Wild Ranger, 32 L. J. Adm. 49.

In the recent case of *Ellis* v. *M Henry*, L. R. 6 C. P. 228, 40 L. J. C. P. 109, the decisions as to what amounts to a discharge of a foreign cause of action are elaborately reviewed. In that case it was held that a discharge by an English composition deed was binding in Canada, and also was clearly binding and effectual as an answer to proceedings commenced in this country on a Canadian cause of action; but further, that no advantage could be taken of such a discharge as an answer to an action on a judgment obtained in a Canadian Court, where such discharge might have but had not been pleaded. In giving judgment, Bovill, C. J., lays down the three following very important propositions:—"In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country.

and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country. Thirdly, where the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case." See also *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, and *ex parte Pascal*, 1 Ch. D. 509, 45 L. J. Bank. 81.]

Another application of the rule that procedure is to be governed by the law of the country in which the action is brought, may be found in the judgment of the Court of Exchequer, in the case of the General Steam Navigation Company v. Guillou, 11 M. & W. 877. The action was on the case for running down a ship at sea; one of the defendant's pleas stated that he was a Frenchman, and that the injury complained of was committed on the high seas, out of the jurisdiction of the Queen of England, not by the defendant personally, but by the master of a French vessel in the employ of a French company, of which the defendant was a shareholder and acting director; that the defendant never was possessed of, or interested in, the vessel which did the injury, otherwise than as such shareholder, and that by the law of France he was not responsible for or liable to be sued or impleaded individually, or in his own name or person in any manner whatsoever, but that by that law the company alone, by their style or title, or the master or person in command for the time being of the vessel, was responsible for and liable to be sued or impleaded, and that the defendant was not the master or person in command. Upon the grammatical construction of that plea, the Court of Exchequer were divided in opinion, but they agreed that if the plea were taken (according to the construction put upon it by Parke, B., and Gurney, B.), to aver that by the law of France the defendant was "not liable for the acts of the master; but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master who was their servant and not the servant of the individuals composing that body;" there was (as they were all strongly inclined to think) a good defence to the action; but that if, on the other hand, the plea were taken (according to the view of Lord Abinger and Alderson, B.) to mean, "that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders under the name of their association;" then that it was bad on the ground that "the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted, the lex fori; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs."

So where a colonial act gave a mode of proceeding against a banking company by suing their chairman, and provided a particular mode of proceeding upon that judgment, against members for the time being, it was considered that the members might, even in respect of a cause of action which arose in the colony, be sued in England either for the original debt or upon

the judgment. Bank of Australusia v. Harding. [9 C. B. 661]; 19 L. J. 345; Bank of Australusia v. Nias, 16 Q. B. 117; [Kelsall v. Marshall, 1 C. B. N. S. 241; Varguelin v. Bouard, 33 L. J. C. P. 79.

And in Bullock v. Coord. L. R. 10 Q. B. 276, 44 L. J. Q. B. 124, which was an action on a contract, a plea was held bad which alleged that the contract was made by the plaintiff, in Scotland, with a Scotch firm, and was to be performed wholly in Scotland, and that by Scotch law it was a condition precedent to the individual liability of the defendant as a member of the firm, that the firm, or the whole of the partners jointly, should first have been sued. The Court of Queen's Bench held that, in an English Court, non-joinder of the other parties was merely ground for a plea in abatement, not for one in bar, that the matters alleged in the plea were mere matter of procedure, and that the plea was bad.

In Copin v. Adamson, 1 Ex. D. 17, 45 L. J. Ex. 15, the defendant was a shareholder in a French company, the statutes and provisions of which provided that, in case of litigation between a shareholder and the rest of the company, the shareholder's domicile should be in Paris, and that in default thereof service at a public office should be good. In the action, which was on a French judgment, the above facts, together with the allegation that by French law the defendant was bound by the company's statutes, were held a good answer to a plea that the defendant was not domiciled within the jurisdiction of France, nor a native of France, nor served with process within the French jurisdiction during the original French suit.

A plea to an action for an assault that it was committed in a foreign country, where damages are not recoverable in respect of it until certain penal proceedings have been commenced and determined there, goes only to procedure: Scott v. Lord Seymour, 1 H. & C. 219.

On the same principle the Master of the Rolls refused to give priority in an administration suit in this country to the claim of a foreign creditor, although the debt, which had been contracted in Venezuela, had been registered, so as to acquire, according to the law of that country, a priority in the distribution of the assets: Pardo v. Bingham, L. R. 6 Eq. 485. And so in Ex parto Melbourn, L. R. 6 Ch. 64, 40 L. J. Bank. 65, a wife was allowed to prove against the estate of her husband, under an English bankruptcy, as a creditor in respect of a marriage contract parti pessa with the other creditors; although, by the law of Batavia, where the contract was made, it would have had, for want of registration, no effect with regard to third parties; the court holding that the effect of this law was only to give the other creditors priority over the wife, and that all questions of priority must be determined by the lex fori.]

In Brown v. Thornton, 6 A. & E. 185, a charter-party was entered into at Batavia. According to the law prevailing there, such instruments are entered in a public book, which is the only evidence of their contents in that colony; a public notary makes two copies from the book, and delivers one to each party, and these are evidence of the original in all Dutch courts except Batavia. Held, that such copies are not evidence of the original in this country. The courts here will not adopt rules of evidence from foreign courts. Appleton v. Lord Braybrook, 2 Stark. 6, 6 M. & S. 34; Black v. Lord Braybrook, 2 Stark. 7, 6 M. & S. 39; [see Abbott v. Abbott, 29 L. J. Matrim. Cases, 29; Bain v. Whitehaven Rly. Co., 3 H. & C. 1.]

In the case of Tulloch v. Hartley, 1 You. & Coll. C. C. 114, the Vice-Chancellor Knight-Bruce is supposed to have departed from this rule, on the

ground that the property in litigation was *real* property; but his honour does not appear to have intended to lay down any exception to the rule so wide as the alleged ground of his decision might suggest. See *Yates* v. *Thomson*, 3 Cl. & Fin. 544.

[In *Hicks v. Powell*, L. R. 4 Ch. 741, the court declined to enforce an unregistered charge on real estate in India, an Indian statute having enacted that no such charge on real estate in that country should, unless duly registered, "be received in evidence in any civil proceeding in any court, or be acted on by any public officer;" the Lord Chancellor Hatherley holding that "it would be a narrow construction, regard being had to the whole Act, to say that the above provision related simply to the question of evidence."

But where to an action on a bottomry bond it was pleaded that the bond was bad because the master had omitted to communicate with the cargo owner before hypothecating the cargo, the C. A. held that the necessity imposed by English law for doing so was not merely evidence so as to be matter of procedure. "The manner of proving facts," says Lord Esher, M. R., "is matter of evidence and to my mind is matter of procedure, but the facts to be proved are not matters of procedure; they are the matters with which the procedure has to deal." The Gaetano and Maria, 7 P. D. at p. 144.

The provisions of the 4th section of the Statute of Frauds have been held only to affect the procedure on contracts; therefore a contract made between a British and a French subject in France, and to be performed there, was held to be unenforceable here, because it was not to be performed within a year from the making of it, and was not in writing. Leroux v. Brown, 12 C. B. 801. See, however, the judgment in Williams v. Wheeler, 8 C. B. N. S. 316, and in Gibson v. Holland, L. R. 1 C. P. 8; also the judgment of the Exch. Cha. in Lloyd v. Guibert, L. R. 1 Q. B. 115; and per Field, J., in Rawley v. Rawley, 1 Q. B. D. 461, 45 L. J. Q. B. 675, and Adams v. Clutterbuck, 10 Q. B. D. 403, 52 L. J. Q. B. 609.

In the last case it was held by Cave, J., to be no defence to an action in England on an agreement of tenancy of a house and shootings in Scotland that the agreement was not under seal: the provision of English law to that effect not being matter of procedure so as to be applied as *lex fori*, and there being no such provision in the law of Scotland.

In the judgment in the principal case it is stated (ante, p. 647), that "the way of knowing foreign laws is by admitting them to be proved as facts." See on this point, Bradlaugh v. De Rin, L. R. 5 C. P. 473; Orr-Ewing v. Orr-Ewing, 22 Ch. D. at p. 465, per Jessel, M. R. The cases are not altogether consistent as to how far it is necessary that the evidence should be that of experts, with actual experience of practice in the foreign courts. See The Sussex Peerage Case, (11 C. & F. 85.) where the evidence of Cardinal Wiseman was admitted as to the matrimonial law of Rome, and Van der Donckt v. Thellusson, (8 C. B. 812); but, contra, see Bristowe v. Sequerville, 5 Ex. 275, a decision which has been recently followed by Sir James Hannen in In the Goods of Bonelli, 1 P. D. 69, refusing to admit the evidence as to Italian law of a Mr. John Reeve, who described himself as a certified special pleader, and as familiar with Italian law; and again in Cartwright v. Cartwright, 26 W. R. 684, where the evidence of an English counsel as to Canadian law was similarly rejected.

By the 24 Vict. c. 11, superior courts of law may for the purpose of ascertaining the law of a foreign state, send a case to a court of that state.

In the absence of proof to the contrary, foreign law is presumed to be the same as our own.

As to when it may be a ground for a stay of proceedings in an action here that another action by the plaintiff against the defendant for the same cause was pending abroad, see McHenry v. Lewis. 22 Ch. D. 397, 52 L. J. Ch. 325; Norton v. Florence Land Co., 7 Ch. D. 332; Perweien Guttar Competny v. Bockwoldt, 23 Ch. D. 225; Hyman v. Helm, 24 Ch. D. 531; The Christiansbory, 10 P. D. 141.]

The dictum attributed to Lord Mansfield, in Mostyn v. Fabriyas, ante, 645, viz., .. The governor is in the nature of a viceroy, and therefore locally, during his government, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment," was dissented from by the Judicial Committee of the Privy Council in the case of Hill v. Bigge, 3 Moore (Privy Council), 465; and Lord Brougham suggested, that the expressions used by Lord Mansfield may have been somewhat altered in the report. In Hill v. Biqqe, to an action of debt brought in a colonial court against the governor, a plea stating his viceregal character was held to afford no defence; but Lord Brougham, adverting to the inconvenience suggested by Lord Mansfield, said, in giving the judgment of the court, "It is not at all necessary that in holding a governor liable to be sued we should hold his person liable to arrest while on service; that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution - though that is liable to a different consideration."

[In the important case of Luby v. Wodehouse, 17 Irish C. L. Rep. 618, it was decided that the Lord Lieutenant of Ireland was not liable to be sued in an Irish court of law for an alleged tortious act done by him in his viceroy's capacity: and on the motion of the Attorney-General for Ireland, the Court, upon affidavits, and relying on the authority of the principal case, directed that a writ issued against the Lord Lieutenant in respect of such an alleged act should be summarily taken off the file, without putting him to plead such defence. The editors are informed that this case has been recently acted upon by the English law officers.

With regard to the rights and liability of sovereign princes themselves to sue and be sued in the courts of this country, the general rule deducible from the cases seems to be that in respect of acts of state they can neither sue nor be sued. Personally, foreign sovereigns cannot be sued at all, and though it has been held that in some cases proceedings in rem may be instituted against their property in this country (The Charkich, L. R. 4 A. & E. 100, 42 L. J. Adm. 17), the dicta to this effect have been overruled in the Court of Appeal, The Parlement Belge, 5 P. D. 197. In certain cases a petition of right may be instituted by a British subject against the Crown; "but it seems clear to us," says Lord Coleridge, C. J., delivering the judgment of the Court of Appeal, in Rustomice v. The Queen, 2 Q. B. D. 69, 46 L. J. Q. B. 238, "that in all that relates to the making and performance of a treaty with another sovereign, the Crown is not and cannot be either a trustee or an agent for any subject whatever. The duty," his lordship adds, of the English sovereign in such a case " was a duty to do justice to her subjects, according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a cestui que trust. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which Parliament can and will correct - not one with which the Courts of Law can deal."]

The liability of sovereign princes to be sued in the courts of foreign countries underwent a full discussion in the very remarkable case of the Duke of Brunswick v. The King of Hanover, 6 Beav. 1, where the defendant was at once a king of one country and a subject of that in which he was sued. Lord Langdale, M. R., in a judgment which exhausts the subject, stated his opinion: 1. That the King of Hanover was "exempt from all liability of being sued in the courts of this country for any acts done by him as King of Hanover, or in his character of sovereign prince;" but that, "being a subject of the Queen," he was "liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject." 2. That "in respect of any act done out of this realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject, it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject." 3. That in a suit in the Court of Chancery against a sovereign prince who is also a subject, "the bill ought upon the face of it to show that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject." And the decree of the Master of the Rolls, allowing the demurrer in that case to a bill seeking an account against the King of Hanover as guardian of the plaintiff, to which office the king, upon his attaining the throne of Hanover, had been appointed under an arrangement springing out of the deposition of the duke pursuant to a decree of the Germanic Diet in 1830, was affirmed by the House of Lords on appeal (2 House of Lords Cases, 1), on the ground that a sovereign is not liable to be sued in respect of matters of state.

In the case of the *Nabob of Arcot* v. *East India Company*, 3 Br. C. C. 291, 4 Br. C. C. 180, 2 Ves. J. 56, see Beames, El. Pl. 73, the Court of Chancery refused to entertain a suit arising out of transactions of state between sovereign powers, though the defendants were subjects of this country.

In Munden v. The Duke of Brunswick, 10 Q. B. 656, it was considered to be no plea to an action on an annuity deed that the defendant was a sovereign prince at the time it was made without showing either that it was an act of state or that the defendant retained his sovereign character at the time of action brought.

And in Wadsworth v. The Queen of Spain, 17 Q. B. 171, and De Haber v. The Queen of Portugal, 17 Q. B. 196, proceedings in foreign attachment instituted against property belonging to those sovereigns in their public capacity by the holders of Spanish and Portuguese bonds were stayed by prohibition. [In support of the general principle of the immunity of sovereign princes and of their property in respect of acts of state, see further Gladstone v. The Ottoman Bank, 32 L. J. Ch. 228; Same v. Musurus Bey, Id. 155; Smith v. Weguelin, L. R. 8 Eq. 198; 38 L. J. Ch. 465; Doss v. Secretary of State for India, L. R. 19 Eq. 509; Twycross v. Dreyfus, 5 Ch. D. 605, 46 L. J. Ch. 510; Vavasseur v. Krupp, 9 Ch. D. 351; The Constitution, 4 P. D. 39; 48 L. J. P. D. & A. 13.

In the case of *The Charkieh*, L. R. 4 A. & E. 100; 42 L. J. Adm. 17, Sir R. Phillimore elaborately discusses the subject of the immunities of foreign princes in this respect, and lays down that the courts of this country have jurisdiction to entertain proceedings instituted *in rem*, though the property be that of a foreign sovereign, and in some cases, it would seem, even though such property may be "of a public character, as for instance a ship of war:" and further, that a sovereign may, by assuming the character of a trader,

waive in respect of such trading the privilege which he enjoys generally as a sovereign and render himself liable to the jurisdiction of an English court. The Court of Queen's Bench refused to interfere in this case by prohibition to the Court of Admiralty. The Charkich, L. R. 8 Q. B. 197; 42 L. J. Q. B. 75.

The above dicta, however, were unnecessary to the decision, as the learned judge further held that the Viceroy of Egypt, to whom the Charkich belonged, was not a forcign sovereign so as to be entitled to the privilege claimed. And in the important case of The Parlement Belge, 5 P. D. 197, the Court of Appeal, after full consideration, overruled them, and held that foreign sovereigns enjoy the same immunity from proceedings in rem as from actions in personam, and that their property is equally privileged in this respect whether ships of war or trading vessels. The subject will be found very fully discussed in the interesting and exhaustive judgment delivered by Lord Esher, then Lord Justice Brett, in the last cited case.

In the later case of *Stronsherg v. Republic of Costa Rica*, 29 W. R. 125, Lord Justice James, after stating that it it is a violation of the respect due to a foreign sovereign or state to issue the process of our courts against such sovereign or state," mentions two exceptions, if they can be called exceptions, to this rule. First, it that where a foreign sovereign or state comes into the courts of this country for the purpose of obtaining some remedy, then by way of defence to that proceeding the person sued here may file a cross claim against that sovereign or state for enabling complete justice to be done between them." Secondly, he refers to it the case in which a sovereign may be named as a defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction, and who alleges that the foreign sovereign has also some claim upon the funds in question. These," adds his lordship, "are the only exceptions."

Thus—to illustrate the first exception and the way in which it has been enforced in our courts—if a foreign sovereign sue here, and a cross action be brought, our courts will stay proceedings in the original action until the foreign sovereign name a proper person to be made a defendant for the purpose of discovery, see Republic of Peru v. Wegnetin. L. R. 20 Eq. 140; Republic of Costa Rica v. Erlanger, 1 Ch. D. 171, and in default of a sufficient affidavit of discovery being made, will dismiss the proceedings, Republic of Liberia v. Rye, 1 App. Cas. 139, 45 L. J. Ch. 297. Security for costs may be ordered: Republic of Costa Rica v. Erlanger, 3 Ch. D. 62.

Whilst instances exemplifying the second exception will be found in *Gladstone* v. *Musurus Bey*, 32 L. J. Ch. 155, where a court of equity granted an injunction restraining the Bank of England from paying over, except under direction of the court, a sum of money deposited by the piaintiff as caution-money for the fulfilment on their part of a concession granted to them by the Turkish government: and in *Lorivière* v. *Morgan*, L. R. 7 Ch. 550, 41 L. J. Ch. 746, where Lord Hatherley, C., affirmed a decree of Malins, V.-C., by which it was directed that a fund deposited with persons in this country by the French government for the purpose of a contract made by them with the plaintiffs should be applied in payment of his claims under the contract. In neither of these cases did the foreign government appear. The judgment in *Larivière* v. *Morgan* was reversed in Dom. Proc.; but upon the ground that the facts showed only a personal undertaking by the defendant, not any trust or assignment of a trust-fund, so as to give the court jurisdiction. *Morgan* v.

Larivière, L. R. 7 H. L. 423, 44 L. J. Ch. 457. The same distinction was dwelt upon in *Twycross* v. *Dreyfus*, *ubi sup*. and in *The Parlement Belge*, 5 P. D. at p. 201. Both these cases are distinguished on the ground that in each of them there was a trustee who could be sued in our courts.

In the case of a suit by a foreign sovereign in amity with us, although the foreign sovereign is entitled to sue in our courts for wrongs done to him by English subjects without authority from the English government in respect of property belonging to him either in his individual or his corporate capacity, yet he cannot maintain a suit here for invasions of his prerogative as reigning sovereign. See the judgments and the cases collected in The Emperor of Austria v. Day, 30 L. J. Cha. 690; The King of Portugal v. Russell, 31 L. J. Cha. 34; Prioleau v. United States of America, L. R. 2 Eq. 659; 36 L. J. Ch. 36; United States of America v. Wagner, L. R. 2 Ch. 582; United States v. McRae, L. R. 8 Eq. 69. Nor can the foreign sovereign sue in the name of his ambassador; Penedo v. Johnson, 22 W. R. 103.

As to how far an English court will entertain an action by an English subject engaged in the service of a foreign government against another official in the same service for a libel contained in a report made by the defendant in his official capacity, both plaintiff and defendant being British subjects, see *Hart* v. *Gumpach*, L. R. 4 P. C. 439; 42 L. J. P. C. 25.]

Upon the same principle which exempts sovereigns from liability to be sued in respect of acts of state, seems to rest the immunity of a soldier against actions by foreigners for acts done by him in a hostile manner, in the name of the government which he serves, provided those acts be either authorised by an actual command, or ratified by a subsequent approval of the government: to such acts the maxim respondent superior seems to apply in its widest sense: and if any injury inflicted by them, (if redress be denied by the government,) there is no remedy but an appeal to arms; see Vin. Abr. Prærogative (L. a): Elphinstone v. Bedreechund, 1 Knapp. (Privy Council), 316; Dobree v. Napier, 2 N. C. 781; Buron v. Denman, 2 Exch. 167; Paradine v. Jane, Style R. 48; [Reg. v. Lesley, 1 Bell, C. C. 220, S. C. 8 Cox, C. C. 269; 29 L. J. Exch. 877; The Secretary of State, &c., of India v. Kamachee Boye Sahaba, 13 Moore, P. C. 22.

On a question whether a government officer was liable to the plaintiffs (who were Indian subjects of her Majesty) for an act done by him in his official capacity, the lords of the Privy Council laid down, that "if the act which he did was in fact wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own spontaneous act and unauthorised, or whether it was done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent if this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration." Rogers v. Rajendro Dult, 13 Moore, P. C. 236; see per cur. Feather v. Reg., 35 L. J. Q. B. 200, 209; S. C. 16 C. B. N. S. 310; Tobin v. Reg., 33 L. J. C. P. 199. See O'Byrne v. Hartington, I. R. 11 C. L. 445, 453, as to the non-liability of a superior officer for a legal order illegally carried out, and see Grant v. Secretary of State for India, 2 C. P. D. 445, 46 L. J. C. P. 681, as to the non-liability of a government official for the dismissal of a military officer, or for the publication of such dismissal in the Gazette.

As to the non-liability of a government official on a contract made by him for the public, see O'Grady v. Cardwell, 21 W. R. 340; Palmer v. Hutchiuson, 6 App. Ca. 619.

As to the liability interse of persons joining in a hostile expedition for acts done in obedience to the lawful orders of government officers sent out in command of the expedition, see $Hodykinson\ v$ Ferme, 2°C, B, N, S, 115. As to an action for acts done abroad by a community officer in his official capacity, as reducing a non-commissioned officer to the ranks, Δc , see $Howes\ v$, Keppel, Wils, 311.

Whether an ambassador is entitled to absolute exemption from suit in the courts of the country to which he is sent, or only to be protected from process which may directly affect his person or property, was discussed in the case of Taylor v. Drouet, 14 C. B. 487, where it was considered unnecessary to decide the question, the court being of opinion that such a privilege, if it existed, was at all events waived by the defendant's having voluntarily appeared to the writ, and not raised any objection until a late stage of the proceedings. Quarre, whether in that case too much stress was not laid upon the opinion of Bynkershock as to proceedings in rem in the case of princes and ambassadors; see Waisworth v. The Quarre of Spain, 17 Q. B. 171, per curium. [The question has since been resolved in favour of the ambassador, on the principle commis coaction a bysite abassa clebat." The Morphalema Steam Navigation Co. v. Martin, 2 El. & El. 94, 28 L. J. Q. B. 310; Charlstone v. Musurus Bey, 32 L. J. Cha. 155; The Secretary of State for India v. Kamatchee Boye Sahaha, 13 Moore, Pr. C. 22; Parkinson v. Pett r. 16 Q. B. D. 152.]

As to the liability of judges for judicial acts, see further, Colder v. Halkett, 3 Moore (Privy Council), 28; Graham v. Lapitte, Ibid. 382; Houlden v. Smith, 14 Q. B. 841; [Gelen v. Hall, 2 H. & N. 379; and Bernardistone v. Soome, 6 Howell, State Trials, 1095; Kemp v. Neville, 10 C. B. N. S. 549, 31 L. J. C. P. 158; Fray v. Blackbarn, 3 B. & S. 576; Scatt v. Stansfield, L. R. 3 Ex. 220; 37 L. J. Ex. 155; Willis v. Maclachlan, 1 Ex. D. 376, 45 L. J. Ex. 689].

Jurisdiction of the Subject-Matter.

Preliminary distinctions.—A superficial examination of the authorities, on the subject of transitory actions, presents much apparent confusion that falls away when expressions are accurately defined, and the subject properly subdivided. In the first place, the division of actions into local and transitory must not be confused with that into real, personal, and mixed. The latter will prove no reliable guide to the former. Again, the question of jurisdiction of the person is, of course, quite distinct from that of jurisdiction of the subject-matter. In determining if a court have jurisdiction of a cause of action that arose, or affects property, outside of its territory, we are not assisted by the circumstance that the defendant has been personally served with its process within that territory, or has voluntarily submitted himself to that jurisdiction. Jurisdiction of

the person is quite as essential as jurisdiction of the subjectmatter to make the judgment or decree a valid one, but its existence does not aid us in determining whether the cause of action itself be local or transitory. Then, again, there is the distinction between the power of a court to enforce a cause of action arising, or affecting property, outside of its territory, and its duty to determine the controversy according to some law other than its own; as, for instance, lex loci contractus or lex loci rei sitae. The application of the foreign law may determine the sufficiency of a claim or defence, but only in isolated cases does it determine the locality of an action. At all events, the duty to apply a foreign law is a different thing from the power to enforce a foreign cause of action. And it is a general principle that the provisional remedies incident to the law of the forum accompany the general jurisdiction, irrespective of the practice of the forum where the cause of action arose. So, too, the capacity in which a defendant is sued may defeat the jurisdiction; a corporation may not exist outside of the territory of the sovereignty which created it; Gibbs v. Queen Ins. Co., 63 N. Y. 114. Courts may decline to interfere with the distribution of assets by a foreign administrator or receiver; Davis v. Morriss, 76 Va. 21. And the jurisdiction of a Court of Chancery, acting in personam on the conscience of the defendant, is only an apparent exception to the doctrine that actions affecting the ownership or possession of real property are local and confined to the forum where the property is situated. So, too, the lack of jurisdiction in so-called Federal causes is referable mainly to those instances in which by the United States Constitution and Acts of Congress, enacted pursuant thereto, Federal courts are given exclusive jurisdiction, or one or both parties the right of removal from state to Federal courts. With this distinction the Federal cases offer great assistance in determining the law of the jurisdiction of the subject-matter. In considering the jurisdiction of causes of action conferred solely by statute, it must be remembered that while there is a presumption that the common law of one state is that of every other, there is no such presumption in the case of statutory law; Whitford v. Panama R. R. Co., 23 N. Y. 465. Some confusion is made in the books by cases construing statutes defining the jurisdiction of local courts. It is uniformly held that such statutes do not apply to actions arising out of the state in which they were

enacted; Home Ins. Co. r. Pennsylvania R. R. Co., 11 Hun 182. Again, there are exceptions more apparent than real, where considerations of comity and international obligation divest the ordinary authority. As, for instance, where courts decline jurisdiction over residents as to property which they hold merely as agents of a foreign government; Leavitt r. Dabney, 3 Abb. Pr. N. S. 469; or of actions for personal injuries done by a defendant, in the exercise of a foreign sovereignty, even though he no longer represent it; Hatch c. Baez, 7 Hun 596. And it should be remembered that the American law on the jurisdiction of the subject-matter is somewhat complicated by the circumstance that it is only in a certain sense that the states are foreign to each other. For the purpose of this note, however, it may be assumed that they are, except so far as the United States Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Considerations of public policy sometimes intervene to make courts decline the jurisdiction which would otherwise be assumed. Thus, although as a general rule courts apply the lex loci in construing all contracts involving questions of marriage, legitimacy, and rights of succession to property, they will not enforce such foreign law if it involves any consequences immoral, contrary to general policy, or in violation of the conscience of the state whose courts are appealed to; Eubanks v. Banks, 34 Ga. 415.

Jurisdiction in general. -- Every act of a court is the exercise of jurisdiction. Jurisdiction itself is the power to hear and determine the controversy between parties to an action or suit. If the law confers the power to adjudicate between the parties, that is to say, to exercise judicial power over them, the court has jurisdiction; Rhode Island v. Massachusetts, 12 Pet. 657. The question presents itself in three forms. A court may act without this power, in which event, its act or judgment is wholly void, and is as though it had not been done; secondly, a court may exercise its power wrongfully, for which its judgment must be reversed on appeal; or, thirdly, it may use its power rightfully, but irregularly, for which its judgment must be corrected on motion; Paine v. Mooreland, 15 Ohio 435; Gray v. Bowles, 74 Mo. 419. Jurisdiction of the person is acquired when the party is before the court, in fact, or constructively, by reason of service upon him of a process known to the law,

and duly issued and executed; Lange v. Benedict, 73 N. Y. 12. An objection to jurisdiction on the ground of exemption from the process of the court, or the manner in which it is executed, is waived by appearance, without making the objection, or by any distinct recognition of the court's authority in the course of a cause; Rhode Island v. Massachusetts, 12 Pet. 657; Minneapolis Works v. Hedges, 11 Neb. 46; Graves v. Richmond, 56 Ia. 69; Rheiner v. Union Depot Co., 31 Minn. 289, and cases there cited. Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action. It is to be distinguished from the power to act upon a particular state of facts; Hunt v. Hunt, 72 N. Y. 217. And it is the power conferred by the act creating the court, or possessed inherently by its constitution; Lamar v. Commissioners Court, 21 Ala. 772. In determining if a court have jurisdiction of the subject-matter, questions as to service of process, voluntary appearance, waiver of objections by answering on the merits, &c., become immaterial because jurisdiction of the subject-matter cannot be conferred by consent; Dudley v. Mayhew, 3 N. Y. 9; Montgomery v. Anderson, 21 How. 386; Brondberg v. Babbott, 14 Neb. 517; nor by waiver, Orcutt v. Hanson, 71 Iowa 514; except that in doubtful cases courts will not permit the objection to prevail after the parties proceed, voluntarily, to hearing on the merits, Appeal of Adams, 6 Atl. Rep. 100; nor by laches, Titus v. Relyea, 8 Abb. Pr. 177; nor by confession of judgment, Coffin v. Tracy, 3 Caines 129; Howell v. Gordon, 40 Ga. 302 (where it was held that a judgment confessed by a non-resident is not binding against a third person, because the court has no jurisdiction against a non-resident, not served with its process). And a legislature, whose powers by the constitution are confined to legislation, cannot confer or dispense with jurisdiction by remedial legislation validating a proceeding void for want of authority to entertain it; Maxwell v. Goet, 11 Vroom 383, and cases there cited. On the other hand, jurisdiction cannot be abridged by agreement between the parties which limits the principle of decision to be adopted in the case; Watts v. Boom Co., 47 Mich. 540. So, too, jurisdiction once vested cannot be ousted by subsequent events; Etes v. Martin, 34 Ark. 410; Morgan v. Morgan, 2 Wheat. 290. And where a court has no jurisdiction, its judgment or decree is not simply voidable but void, and may be collaterally impeached; Lamar r. Commissioners Court. 21 Ala. 772; Campbell v. McCahan, 41 Ill. 45; Mersier v. Chase, 91 Mass. 242; and its process then gives no protection to the officer of the court executing it; Driscoll r. Place, 44 Vt. 252; Allen v. Carey, 10 Wend. 349; Skilton v. Winslow, 4 Gray 441. And it seems that when a court having jurisdiction is properly applied to, it must exercise it, from whatever source obtained; Cook v. Whipple, 55 N. Y. 150. But, on the other hand, where there is no jurisdiction, a court will not proceed with the matter, and should not even render an opinion, because its judgment will be fruitless. A judicial judgment is the product of the power of the law. If the law do not confer the power, it is a nullity; Smith r. Myers, 109 Ind. 1; Robertson v. State, Id. 79. Thus, for instance, a member of the bar cannot be given jurisdiction of a cause by consent, and a court will not even entertain an appeal from his decision; Hoagland v. Creed, 81 Ill. 506. Finally, distinction must be made between limitation of jurisdiction and inferiority of jurisdiction. Every court is subject to some limitation, territorial or otherwise. But courts of limited jurisdiction are not necessarily inferior in the sense that there is no presumption of jurisdiction when their judgments are assailed collaterally; People v. Bradner, 107 N. Y. 1.

Transitory Actions.

1. Independently of statute law. — Transitory actions are those in which the transaction is one that might have occurred at any place; local actions are those in which the transaction is necessarily local. This distinction is technical, but too well established to be disregarded; Livingston v. Jefferson, 1 Brock. 203. Personal actions whether ex contractu or ex delicto are transitory and may be brought anywhere, whatever the residence of the parties. In contemplation of law, the injury arises anywhere and everywhere. The right to recover rests on the presumption that the common law prevails where the cause of action arose, and that the plaintiff could have recovered there; Leonard v. Columbia Steam Co., 84 N. Y. 48. As soon as one person becomes liable to another in such action, that liability attaches to the person and follows him wherever he goes. He cannot, by removing from one place to another, discharge himself of that liability; Stout v. Wood, 1 Blackf. 70;

Smith v. Bull, 17 Wend. 323; Hale v. Lawrence, 1 Zab. 714; Curtis v. Bradford, 33 Wisc. 190; Peabody v. Hamilton, 106 Mass. 217, and cases there cited. Such actions include slander, Boynton v. Boynton, 43 How. Pr. 380; negligence, Central R. R. Co. v. Swint, 73 Ga. 651; Atkinson v. Erie Railway Co., 2 Vroom 309; assault and battery, Watts v. Thomas, 2 Bibb. 458; Newman v. Goddard, 3 Hun 70; trover, Robinson v. Armstrong, 34 Me. 145; case for assisting plaintiff's slave to escape, Northern R. R. Co. v. Schell, 16 Md. 331; fraud, Johnson v. Whitman, 10 Abb. Pr. N. S. 111; enticing away plaintiff's wife, Burdick v. Freeman, 46 Hun 138. As to that species of property which has no habitat, such as debts or choses in action, jurisdiction of the person must include jurisdiction of the thing; Keyser v. Rice, 47 Md. 203. An action lies for illegal collection of a tax in another state; Henry v. Sargent, 13 N. H. 321. An action will be maintained by one non-resident against another to subject to the payment of a debt the shares of a domestic corporation; Quarl v. Abbott, 102 Ind. 233. In Barton v. Barbour, 104 U.S. 126, it was held that a receiver cannot be sued even at law, in the courts of one state for the personal wrongs of his agents, when he is in possession of and managing property administered by the court of his appointment, in another state. But it was decided otherwise in Allen v. Central R. R. Co., 42 Iowa 683, and in Kenney v. Crocker, 18 Wisc. 74, where it was held that the action would lie without leave of court even though the receiver had been appointed by the Federal court. The courts will not enforce the internal revenue laws of another nation; McFee v. South Car. Ins. Co., 2 McCord 503. And quære, if a court will entertain an action for injury resulting from the defective condition of a highway in another state, the matter intimately concerning the internal police regulations of that state; Hunt v. Pownal, 9 Vt. 411; and see Molony v. Dows, 8 Abb. Pr. 316, where the court declined jurisdiction of an action for injuries done by a vigilance committee in another state; and see Pickering v. Fish, 6 Vt. 102. But where all the parties are non-residents and the cause of action arose out of the state, although the court does have jurisdiction, its exercise is a matter of sound discretion, and it should not be exercised unless special causes are shown to exist; Burdick v. Freeman, 46 Hun (N. Y.) 138. The fact, however, that there is fear of the defend-

ant's influencing a jury in his state is not a reason recognized for retaining jurisdiction. And it should be declined if defendant is only easually here; DeWitt v. Buchanan, 54 Barb. 31. Jurisdiction in such cases rests on comity and will be deelined where a statutory tort (putting off defendant from cars between stations) has been committed outside of the United States, both parties being aliens; Great Western R. Co. r. Miller, 19 Mich. 305. So, too, the cognizance of wrongs on the high seas, both parties and the vessel being foreign, is not a matter of right but of discretion, and it ought not to be exercised where, for aught that appears, both parties intend to return immediately to their own country; Gardner v. Thomas 14 Johns, 134. Such an action, however, by a discharged seaman, or one leaving without the mate's objection, should be entertained; Johnson v. Dalton, 1 Cow. 543. And on the other hand, a stipulation by a seaman not to sue except in his own country ought to be observed unless the voyage is ended; Olzen v. Schierenberg, 3 Daly 100. The objection to entertaining jurisdiction in cases where it is a matter of discretion, should be taken by motion; De Witt v. Buchanan, 54 Barb. 31. A mere request to the court to charge the jury that action is not maintainable held insufficient: Burdick v. Freeman. 46 Hun 138.

Where all the facts transpired, while both parties were residents of another state, the rights must be determined according to the law of that state; Saltee v. Chandler, 26 Mo. 124; R. R. Co. v. Kanaley, 17 Pac. Rep. (Kans.) 327. On the other hand, where in an action of slander for words not actionable at common law, but made so by the statute of the forum, it will not be presumed that a similar statute exists in the state where the words were spoken, and the action will not be entertained; Stout v. Wood, 1 Blackf. 70. But although a cause of action be assigned in a state where such assignment is void, the assignee will be recognized in the forum of the state where the cause of action arose, if in such state such an assignment would be valid; Vimont v. R. R., &c., Co., 69 Iowa 296. Provisional remedies follow the law of the forum. So that in an action between non-residents, defendant can be arrested for fraud in contracting a debt, although he could not, in the state where it was contracted, and although the whole transaction took place outside of the state; Johnson v. Whitman, 10 Abb. Pr. N. S. 111.

A foreign creditor may have against a foreign debtor, temporarily in the state, all the remedies afforded by its court even though harsher than the remedies of the place where the contract was made; Sicard v. Whale, 11 Johns. 194; Peck v. Hozier, 14 Johns. 346. The pendency of an action in one state is no bar to an action between the same parties and with the same subject-matter in another. A judgment in one state does not merge the cause of action so as to oust jurisdiction in other states; Davis v. Morriss Executors, 76 Va. 21.

Transitory Actions. As affected by Statute Law.

A remedy given by a statute of another state, for wrong done there, will be enforced in the courts of any other state whose public policy is not opposed thereto. Thus, where a person is killed by the negligence of a defendant in any state where the statute gives the personal representative the right to recover damages, either generally for the benefit of the estate, or specially for the benefit of the widow and next of kin, or otherwise, recovery can be had in any other state, where the personal representative, properly qualified, applies for relief; Leonard v. Navigation Co., 84 N. Y. 48; Dennick v. R. R. Co., 103 U. S. 11; Morris v. R. R. Co., 65 Iowa 727. The contrary doctrine, where the foreign statute does not declare the remedy to be for the benefit of the estate generally, is held in certain jurisdictions on the ground that this remedy, given to the personal representatives as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a foreign administrator virtute officii, so as to give him a right to sue in the courts of the state where appointed, and to transmit the rights of action from one person to another in connection with the representation of the deceased.

"A succession in the right of action not existing by the common law cannot be prescribed by the laws of one state to the tribunals of another;" Richardson v. R. R. Co., 98 Mass. 85; Taylor v. R. R. Co., 78 Ky. 348. So, too, such relief was denied on the ground that the administrator is not appointed to represent the interest for whose benefit the foreign statute gives the remedy; Mackay v. R. R. Co., 14 Blatch. 65; Woodard v. R. R. Co., 10 Ohio St. 121 acc., because the statute establishes a special trust. Semble aliter, if an administrator

appointed in the state where the injury occurred sues here to recover the funds for distribution in the state of appointment. But the former seems to be the sounder doctrine. The court of the forum can compel proper distribution as well as the foreign court. The administrator often receives property which must go direct to the next of kin or legatees and not to the general estate. The statute could have limited the right if that had been the intention. "It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory or a common law right;" Justice Miller, in Dennick v. R. R. Co., 103 U. S. 11. On the other hand, although actions for personal injuries committed abroad are sustained in the first instance, without proof of the lex loci, this presumption does not apply where the wrong complained of is one for which redress can only be given by statute; McDonald v. Malory, 77 N. Y. 546. So that if defendant's wrong causes death in a state where there is no statute giving a remedy, the fact that there is such a statute in the state of the forum gives no cause of action; Hyde r. Wabash Co., 61 Iowa 441; Needham v. R. R. Co., 38 Vt. 294. Even though both parties are citizens of the state of the forum, and the negligence causing the death was a breach of contract entered into in such state. If the wrong is not actionable where it was committed, it would be contrary to all reason that it should be made so, by invoking redress in another state; State v. R. R. Co., 45 Md. 41. Such statutes have no extra-territorial effect and it cannot be presumed with respect to positive statute law, that the laws of other states are similar to those of the forum; Debevoise v. R. R. Co., 98 N. Y. 377.

A liability in the nature of a penalty imposed by statute will be enforced only by the courts of the state which enacted it; National Bank v. Price, 33 Md. 498. As, for instance, where a statute makes the directors of a company liable for its debts, in consequence of certain derelictions of duty. It is not like the contractual obligation of stockholders, Corning v. McCullough, 1 Comst. 47; or the charter obligation of incorporators, and this liability of directors is not to be construed as arising out of a contract, implied from the acceptance of the charter; Bird v. Hayden, 1 Robertson 383; Derrickson v. Smith, 3 Dutcher 166. Foreign statutes are respected and

enforced beyond the territory in which they are enacted only as a matter of comity and public policy, and foreign courts will not enforce such as impose, by way of penalty, on stockholders or directors, liability for corporate debts; Halsey v. McLean, 12 Allen 438. The same doctrine applies to usury laws; Gale v. Eastman, 7 Metc. 14. And to statutes imposing double damages on railroad companies for injury to property, in running their trains; Bettys v. R. R. Co., 37 Wisc. 326. Semble contra, Boyce v. R. R. Co., 63 Iowa 70, in which case, however, it is to be noted that a similar statute existed in the court of the forum, making the "policy" the same in both states. So, too, a penalty imposed by act of Congress upon a national bank will not be enforced by a state court, although Congress expressly authorizes it so to do; Missouri Tel. Co. v. National Bank, 74 Ill. 217. Sed contra, National Bank v. Overman, 22 Neb. 116, and cases cited. And a statute making a witness convicted of an infamous offence, incompetent to testify, has no extra-territorial effect; Commonwealth v. Green, 17 Mass. 515. On the other hand, though foreign penal statutes will not be enforced, yet where, e.g., as in statutes relating to gambling, they create a debt, the cause of action for the debt becomes transitory; Flanagan v. Packard, 41 Vt. 561.

A legislature cannot create personal liabilities on account of transactions occurring beyond its territory, and give them a character which they do not have at the place of their occurrence; Steamboat v. Stunt, 10 Ohio St. 582; Le Forest v. Tolman, 117 Mass. 109; Stout v. Wood, 1 Blackf. 70. Comity does not require a court to sacrifice the rights of its own citizen to protect a plaintiff against the consequences of his own acts under statute and municipal regulations of other states; Woodward v. Roane, 23 Ark. 523. An official bond given in another state, and by statute, enforceable only in a particular way and by a particular officer as often as necessary, for the benefit of any relator, can be enforced, in that way, only by the courts of such state; Pickering v. Fish, 6 Vt. 102. A vessel registered at a port of the state is within its territory, even while on the high seas, in the sense that an assignment by the Insolvency Court passes title as against subsequent transfers or proceedings in rem; Crapo v. Kelly, 16 Wall. 610. A court will enjoin one citizen at the prayer of another, from prosecuting an attachment in another state, to subject to the payment

of a debt, earnings exempt by the law of the state, of which the parties are residents; Snook v. Snetzer, 25 Ohio St. 516.

Transitory Actions, quasi Local.

a. At law. - It is a general rule that actions involving the ownership or possession of lands are local. And courts will not take jurisdiction of such actions affecting lands outside of their territory, even to prevent a failure of justice or because the remedy of the forum is less difficult or doubtful; Livingston v. Jefferson, 1 Brock. 203. Actions of trespuss quare clausum fregit are local; De Courcy v. Stewart, 20 Hun 561. Even though the trespass be followed by asportation of chattels; Dodge v. Colby, 37 Hun 515. But it seems that if the action were simply for conversion of property so carried away, thus waiving the original trespass, action would become transitory; American Co. v. Middleton, 80 N. Y. 408; Newman v. Goddard, 3 Hun 70; Whidden v. Scaley, 40 Me. 247. But defendant to oust the jurisdiction must prove the property to be realty. It must appear affirmatively that plaintiff owns the soil; Rogers v. Woodbridge, 15 Pick. 146. And where the gravamen of the action is negligence, as for negligently setting fire to plaintiff's house, Home Ins. Co. r. R. R. Co., 11 Hun 182, or for negligently shipping explosives resulting in injury to real property, Barney v. Burstenbinder, 7 Lans. 210, the action is transitory. So, too, actions for diverting water are local; Watts v. Kinney, 23 Wend. 484. Although it seems that Chancery, in some cases, has taken jurisdiction to prevent hardship. And semble contra, if action is brought in the state where the diverting is done, even though the lands injured are in another state; Manville Co. v. Worcester, 138 Mass. 89. Actions for wrongfully overflowing plaintiff's land are local, Eachus v. R. R., 17 Ill. 434, and cannot be entertained where the wrong was done, if the injury be to lands in another state; Wooster v. Lake Co., 25 N. H. 525. Actions for waste are local; Cragin v. Lovell, 88 N. Y. 258. And a nuisance on lands in one state, injuring lands in another, is actionable in the latter; Ruckman v. Green, 9 Hun 225. Actions for breath of convenants affecting real property and depending upon privity of estate are local; Lewis v. Ellis, 6 Mass. 331; Clark v. Scudder, 6 Gray 132; White v. Sanborn, 6 N. H. 220. But so long

as the recovery does not affect the real property, and does not depend on privity of estate, actions are not local, even though real property be the subject-matter. Therefore, actions for use and occupation, Henwood v. Cheeseman, 3 Serg. & R. 500, and for damages for breach of covenant to convey, Mott v. Coddington, 1 Robertson 267, are transitory; see Bethell v. Bethell, 92 Ind. 318. And in an action on a bond given for the price of land in another state, the court has jurisdiction to determine the question of title. The principal draws after it all incidents; Clark v. McIntyre, Add. 235.

b. In equity. — The same rule as to local actions is followed in a court of equity. Its decree cannot bind foreign lands. But it can bind the conscience of the defendant with respect to the land, and therefore having jurisdiction of the person it will proceed in all cases of fraud, trust or contract, even though its decree affect land outside of the territory; De Klyn v. Watkins, 3 Sandf. Ch. 185; Vaughn v. Barelay, 6 Whart. 392. Thus courts of equity have jurisdiction to compel a conveyance by defendant of land in a foreign state; Gardner v. Ogden, 22 N. Y. 327; Farley v. Shippen, 1 Wythe 254. But no conveyance except by the party holding the actual title can be effective. A court cannot by its judgment or decree pass the title to land situate in another country; Watkins v. Holman, 16 Pet. 25. No statute or decree of another state, without the actual conveyance according to the law of the situs, can affect the title itself; West v. Fitz, 109 Ill. 442. In default of conveyance by the owner, the court cannot transfer title by the deed of its own officers, e.g., by a guardian ad litem for infants; Page v. McKee, 3 Bush 136. And courts will not establish a trust affecting lands in another state, Servis v. Nelson, 1 McCart. 94; nor compel a testamentary trustee with power under a will to sell lands in another state to exercise such power, Blunt v. Blunt, 1 Hawks 365. But courts will enforce specific performance of a contract relating to foreign lands, Newton v. Bronson, 13 N. Y. 587; Olney v. Eaton, 66 Mo. 564; even though where the contract to be performed within the territory of the court is made outside by non-residents, Baldwin v. Talmadge, 39 Super. Ct. (N. Y.) 400, and cases cited; and even though the only defendant who has an interest in the land is without the jurisdiction, by compelling delivery of an executed deed in the possession of the vendor's agent, Ward v. Arredondo, Hopkins 213; Shattuck v. Cassidy, 3 Edw. 152. But a court cannot annul the conveyance of land situate in another state. The state of the situs could disregard such a decree. While a court can compel those before it to release their claims, it cannot assume that the rights of bona fide purchasers have not intervened; Cooley v. Scarlett, 38 III. 316; Davis v. Headley, 7 C. E. Green 115. The title to immovable property can only be affected in the mode recognized by the laws of the state within whose territory it is situated. If it could be, by mere decisions of the courts of other states, registry laws would be of no avail; City Ins. Co. v. Commercial Bank, 68 III. 348. But it was decided, in Guerrant v. Fowler, 1 Hen. & Mun. 5, that a court has jurisdiction to decree cancellation of a deed obtained within its jurisdiction by fraud. Courts of equity can state an account between owners of an island in a foreign country. The decree would be in personam not in rem; Wood v. Warner, 2 McCart. 81. A court of equity will not enforce a trust created by statute of another state relating to land in that state, a bond to a court of that state being required by such statute, for the proper performance of the trust; Alger v. Alger, 31 Hun 471. Courts of equity, at the request of one railroad claiming the exclusive right, will not take jurisdiction of a bill to enjoin another from building its road in a territory outside of the state; Northern Indiana R. R. Co. v. Northern Central R. R. Co., 15 How. 233. But it was decided in Alexander v. Tolleston Club, 110 Ill. 65, that a court has jurisdiction to restrain defendant from interfering with a right of way in a foreign state. Courts cannot compel a sale of land situated in another state or appropriation of proceeds to pay complainant's mortgage; Tiffany v. Crawford, 1 McCart. 278. But a strict foreclosure of a mortgage on lands in another state will be granted; House v. Lockwood, 40 Hun 532. And where two or more corporations of different states are consolidated, a court of either of the states in foreclosing a mortgage on the consolidated property has jurisdiction in one suit to sell all the property in all the states. Separate suits are unnecessary; Blackburn v. Selma, &c. R. R. Co., 2 Flip. C. Ct. 525; Mead v. New York, &c. R. R. Co., 45 Conn. 199. Courts have power to declare void a mortgage on foreign lands, and to decree surrender of same; Williams v. Fitzhugh, 37 N. Y. 444. Also to compel a judgment debtor to execute a deed of foreign lands for the benefit of his creditors; Bailey v. Ryder, 10 N. Y. 363. But they have no jurisdiction to restrain a nuisance affecting foreign lands; Morris v. Remington, 1 Pars. Eq. 386. A fraudulent conspiracy in another state to deprive plaintiff of title to lands in such state is transitory, so far as his right to damages and an account of rents is concerned; Mussina v. Belden, 6 Abb. Pr. 165. So, too, suits for partition of real property are local, although a court in one state, may, it seems, entertain jurisdiction, where lands are situated in that and another state, if it be possible to allot complainant's share from the lands in the state of the forum; Cates v. Woodrow, 2 Dana 457. Courts of the state where the land is situated will not recognize title made by the court of another state, in a decree of partition; Johnson v. Kimbro, 3 Head 557; White v. White, 7 Gill & J. 208. A stipulation between parties agreeing to partition in one state of lands, in another gives jurisdiction, and an injunction of partition proceedings in the other state will be granted; Bowers v. Durant, 43 Hun 348.

Foreign Corporations.

Independently of statute, a foreign corporation cannot be sued in invitum, even though some of its stockholders reside in the state, and service is made there on the secretary while temporarily present; Middlebrook v. Springfield Ins. Co., 14 Conn. 306. And although a statute provide generally for service on a corporation by service on one of its officers, such service if made on an officer of a foreign corporation does not give the court jurisdiction. Service must be made in the state of its creation; Sullivan v. La Crosse Co., 10 Minn. 386. But a state may, in permitting a foreign corporation to transact business, impose as a condition that the corporation shall accept as sufficient the service of process on its agents, and such condition may be implied as well as expressed; St. Clair v. Cox, 106 U. S. 350, 356. The agent or officer must be in the state in a representative or official capacity, and not as a mere "casual individual"; at all events, in actions by non-residents on causes of actions arising outside of the state; Newell v. R. R. Co., 19 Mich. 336. Where a foreign corporation is practically a domestic one, i.e., has an office and transacts business in the state, it may be sued like a domestic corporation on transactions occurring in such state; Bawkright v. Ins. Co.,

55 Ga. 194. But a railroad company incorporated in one state, though running its trains into another, is not liable there to passengers injured in the former state; R. R. Co. r. Carr, 76 Ala. 388. No action can be maintained against a foreign corporation unless the contract sued on was made or the injury complained of was suffered within the state; Bawkright v. Ins. Co., 55 Ga. 194; Brooks v. Mexican Co., 50 Super. Ct. (N. Y.) 281; Parke v. Ins. Co., 44 Pa. St. 422. And it seems that under the New York code a resident may recover against a foreign corporation for any cause of action wherever it arise, and although property beyond the jurisdiction may be affected, or the relief within the power of the forum to grant incomplete; Ervin v. Oregon Co., 62 How. Pr. 490, and cases there cited. One foreign corporation may sue another for wrongful transfer of stock made in the state of the forum; Toronto Co. r. Chicago Co., 32 Hun 190. But a non-resident cannot sue a foreign corporation to compel specific performance of a contract to convey lands outside of the state; Hann v. Barnegat Co., 7 Civ. Proc. (N. Y.) 222. When two corporations created in different sovereignties consolidate, the one state cannot with its legislation follow the consolidated corporation into the other; R. R. Co. v. Auditor General, 53 Mich. 79. And a court of one state cannot compel a corporation chartered in that and another state to go into the latter to perform a duty in the matter of right of way. It would seem to be otherwise if the act could be performed in the state of the forum, even though that act affected land outside of such state; R. R. Co. v. Hammond, 58 Ga. 523. Though the charter of a corporation has expired, and a receiver has been appointed in the state of its creation, comity does not prevent the attachment by a corporation of another state of lands in such state. The contracts of the corporation survive. And the decree appointing the receiver cannot cover real property in another state; Ins. Co. v. Commercial Bank, 68 Ill. 348. Courts decline to exercise jurisdiction in cases involving the internal affairs of foreign corporations, its officers, books, and assets not being within their jurisdiction and contempt proceedings impracticable. Therefore they will not enforce an agreement to make apportionment of money to be received by it; Fisher v. Ins. Co., 52 Super. Ct. (N. Y.) 179. So, too, in a suit by a stockholder of a foreign corporation

against it and another corporation to which it had leased its property, seeking relief relating to the transactions between said corporations; Gregory v. R. R. Co., 13 Stew. 39. Nor will a court assist a non-resident to be reinstated in a forfeited policy issued by a foreign life insurance corporation, although it transact business and have a resident agent in the state. The proceeding invoked, seeking to establish an artificial relationship, affects the organic law of the corporation, which is necessarily local and requires local administration; Smith v. Ins. Co., 14 Allen 336. Where a charter provides for stockholders' liability by levy on their property on execution against the corporation, and for compelling ratable contribution by the same process, there is no general liability of stockholders, so that jurisdiction is limited to the state granting the charter; Lowry v. Inman, 46 N. Y. 119.

Illustrations under Federal Law.

Admiralty can take jurisdiction of maritime torts committed beyond United States boundaries on foreign ships in actions between aliens; Mason v. Ship Blaireau, 2 Cranch 240. Where a state statute gives a right of action for causing death, and such death is caused on the high seas by the tort of a vessel having its home port in said state, admiralty will enforce the right in rem; The E. B. Ward, 17 Fed. R. 456; The Harrisburg, 119 U. S. 199 quære. State courts have concurrent jurisdiction of causes of action cognizable in admiralty, where only a common law remedy is sought; Bohannan v. Hammond, 42 Cal. 227; Schoonmaker v. Gilmore, 102 U.S. 118. State courts cannot enforce a maritime lien nor can state legislatures create one. But they can enact liens and provide for their enforcement in rem, where they do not exist in admiralty; e.g., for supplies obtained in the home port; Dever v. Steamboat, 42 Miss. 715. So, too, rights growing out of a United States bankruptcy law may be enforced in state courts in all proceedings not involving the administration of the law itself; Goodrich v. Lincoln, 93 Ill. 359; Cook v. Whipple, 55 N. Y. 150; Stevens v. Bank, 101 Mass. 109; Hastings v. Fowler, 2 Carter 216; Brown v. Hall, 7 Bush 66; Gage v. Dow, 58 N. H. 420. But Brigham v. Claflin, 31 Wisc. 607, contra, on the ground that the act making certain transfers void is penal, and should not, therefore, be enforced in state courts. State courts have jurisdiction to enforce a penalty against a national bank. If exclusive jurisdiction be not given to the Federal courts, either expressly or by necessary implication, the state courts may act. Congress cannot compel them to act. It simply confers authority; First National Bank v. Overman, 22 Neb. 116, and cases there cited. Property in the hands of a United States marshal, seized under process duly issued, cannot be interfered with either by injunction or replevin issued out of a state court; Freeman v. Howe, 24 How. 450. If the Federal process be valid, the question of title is irrelevant in the state court; Fensier v. Lammon, 6 Nev. 209. And the same rule applies to habeas corpus; Ex parte Holman, 28 Iowa 88. But contra, Gilman v. Williams, 7 Wisc. 329, to the effect that property unlawfully taken is not within the custody of the law. See, also, Borth v. Ableman, 16 Wise, 460, deciding that the state court has jurisdiction to return to the marshal property unlawfully replevied from him. But where the amount involved is so small that the claimant cannot proceed for relief in the Federal courts, replevin from the state court will lie against the marshal; Carew v. Matthews, 41 Mich. 576. And an exception occurs where consent has been obtained from the Federal courts to proceed against the marshal for the recovery of the property in an action clearly identified; Smith v. Bauer, 12 Pac. Rep. (Col.) 397. And the above doctrine does not prevent actions only for damages, for the wrongful taking and detention; Chapin v. James, 11 R. I. 86; Stoughton v. Mott, 13 Vt. 175. A state legislature has no power to abdicate its jurisdiction over places within its limits, except where title has been acquired by the United States, and even then the jurisdiction to punish crime continues until Congress by further act has extinguished the state authority and vested exclusive jurisdiction in the Federal courts; In re O'Connor, 37 Wise. 379; Marion v. State, 20 Neb. 233; Foley v. Shriver, 81 Va. 568.

Actions affecting Estates of Decedents.

As a general rule a suit cannot be maintained against an executor, except in the country from which he derives his authority. He is accountable there for proper distribution, and it would be a hardship to require him to account elsewhere. And domestic creditors can object to any transfer of assets until their demands have been satisfied, Davis v.

Morriss, 76 Va. 21; particularly where the will has not been proved, as permitted by statute, in the state of the forum, Van Giesen v. Banta, 13 Stew. 14; Cocks v. Varney, 42 N. J. Eq. 514. Where there are no assets in the foreign forum, and the executor is not personally liable, Murphy v. Hall, 38 Hun 528; or is not sued as an executor de son tort, Campbell v. Tousey, 7 Cowen 64, that court has no jurisdiction, Gray v. Ryle, 50 Super. Ct. (N. Y.) 198. But under special circumstances, where it does not appear but that all creditors are in the state of the forum, or that the local law is peculiar in affecting such right of property, foreign courts may, in the exercise of a sound judicial discretion, assume jurisdiction; Powell v. Stratton, 11 Gratt. 792; Moses v. Hart, 25 Gratt. 795. Jurisdiction in equity against a foreign administrator is limited to cases not simply where there are assets in the state, but where these assets are being squandered, or to prevent breach of trust and the like; see Kanter v. Peyser, 51 Super. Ct. (N.Y.) 441. On the other hand, courts of the state in which the will is probated have jurisdiction to order parties coming before them, either as proponents or witnesses to another will, to turn over property belonging to the estate, held by them in another state; Dietz Case, 41 N. J. Eq. 284. A trust, though relating exclusively to personal property, will not be enforced if it arise under a will probated in a different state; Campbell v. Sheldon, 13 Pick. 8; Campbell v. Wallace, 10 Gray 162. In the case of legacies charged on lands, the action may be brought where the land is situated, even though the will is proved and the executor resides in a different state; Rennie v. Crombie, 1 Beas. 457. And it cannot be brought elsewhere, in a suit to subject the land; Williams v. Nichol, 47 Ark. But suits brought to have legacies declared liens are transitory; Lewis v. Darling, 16 How. 1. The devisee of lands, situated in another state, and charged with a legacy, can be sued anywhere, on the implied assumpsit resulting from the acceptance of the devise, although the testator resided and the defendant was appointed executor, in the state of the situs; Brown v. Knapp, 79 N. Y. 136. An ancillary administrator, who settles his accounts showing a balance in his hands in the ancillary jurisdiction, is directly liable thereon to the principal administrator in the jurisdiction of principal administration; Garland v. Garland, 12 Va. L. J. 398.

CREPPS v. DURDEN ET ALIOS.

TRINITY. - 17 GEO. 3, B. R.

[REPORTED COWP. 640.]

A person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to the statute 29 Car. 2, c. 7.

And if a justice of peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie, before the convictions are quashed (secus now, as to the last point, by the 11 & 12 Vict. c. 44, s. 2) (a).

This was an action of trespass brought by the plaintiff against the defendant, for breaking into his house and taking away his goods, and converting them to his own use; to this the general issue was pleaded, and the cause came on to be tried at Westminster before Lord Mansfield, at the sittings after Easter term, 1777; when a verdict was found for the plaintiff, for three several sums of five shillings each, and costs 40s., subject to the opinion of the court upon the following case:—
"That the plaintiff was convicted of selling small hot loaves

(a) See an analogous case. Brooks and another v. Glencross, 2 M. & Rob. 62; and see R. v. Eastern Counties Railway, 10 M. & W. 58. As to the effect of two orders or convictions for the same offence, see Wilkins v. Hemsworth, 7 A. & E. 807; Wilkins v. Wright, 3 Tyrw. 830, 2 C. & M. 193. ["The form which the legislature uniformly adopts, when the intention is that for each and every violation of an act of parliament there shall be a distinct penalty, is to impose a pen-

alty by express words for each and every offence," Pollock, C. B., A.-G. v. McLean, 1 H. & C. 750. One conviction for several curses on same day with a cumulative penalty at the rate of so much per curse held good, R. v. Scott. 33 L. J. M. C. 15. Several convictions for selling pieces of bad meat at same stall on same day held good, in Re Hartley, 31 L. J. M. C. 232. Ex parte Beal, L. R. 3 Q. B. 387.]

of bread, the same not being any work of charity, on the same day (being Sunday) by four separate convictions, which were as follows: 'Westminster to wit. Be it remembered, that on the 10th of November, 1776, Peter Crepps, of, &c., baker and salter of bread, is lawfully convicted before me, Jonathan Durden, one of his Majesty's justices of the peace for the said city and liberty of Westminster, for unlawfully doing and exercising certain worldly labour, business, and work of his ordinary calling of a baker in the parish aforesaid, by selling of small hot loaves of bread, commonly called rolls, the same not being any work of necessity or charity, on the said 10th of November, being the Lord's day, commonly called Sunday, contrary to the statute in that case made and provided; for which offence I, the said Jonathan Durden, have adjudged, and do hereby adjudge, the said Peter Crepps to have forfeited the sum of five shillings.'"

The three other convictions were verbatim the same without any variation. The case then proceeded to state, that the defendant Durden issued the four warrants, afterwards stated, to the other defendants who by virtue of those warrants levied the four penalties of five shillings each, and the expenses. The first of these four warrants ran thus: - "Westminster to wit. To the constables of St James's, in the city and liberty of Westminster. Whereas information has been made before me, Jonathan Durden, one of his Majesty's justices of the peace for the city and liberty of Westminster, that Peter Crepps, baker, of, &c., did on the 10th of November, 1776, being the Lord's day, commonly called Sunday, exercise his trade and ordinary calling of a baker, by selling hot loaves of bread, contrary to the statute in that case made and provided; and whereas the said Peter Crepps has been duly summoned to appear before me, to answer to the said information, but has contemptuously refused to appear to answer the contents thereof; and whereas, upon full examination, and upon the oath of J. H., the said Peter Crepps was lawfully convicted before me of the offence aforesaid, whereby he has incurred the penalty of five shillings, pursuant to the statute in that case made and provided; therefore, &c. &c." The words of the other three warrants were verbatim the same.

The first question reserved was, whether in this action, and before the convictions were quashed, an objection could be made to their legality? if an objection could be made, then a

nonsuit was to be entered. But in case an objection to their legality might be made, then the question was, whether the levy under the three last warrants could be justified? If not justifiable, a verdict was to be entered for the plaintiff, with 15s. damages and 40s. costs; if justifiable, then a verdict was to be entered for the defendants.

Mr. Buller, for the plaintiff, as to the first point, insisted that wherever a conviction is in itself clearly bad, it is open to the party to take objection to it in an action against the justice; and it is no answer on his part to say, that the conviction is not quashed, or in force; because it is incumbent upon him to show the regularity of his own proceedings. That there were several cases to this purpose; and though they were decisions at Nisi Prins, yet, as they were uniform in laying down the same doctrine, they ought to have considerable weight in this case. The first he should mention was Hill v. Bateman, 1 Str. 711; not for the principal matter adjudged, but because it was agreed on all hands, in that case, as a settled point, "that in all actions against justices of peace, they must show the regularity of their proceedings." He added that he had a manuscript note of the same case to the same purport. In a case of Moult v. Jennings, coram Eyre, C. J., upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing; and Eyre said, if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. In Stanbury v. Bolt, coram Fortisque, J., Trin. 11 G. 1, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned; and the conviction was adjudged void for that reason only. In Coles's Case, Sir William Jones, 170, it was held by the whole court, "that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void, and coran non judice." There are other authorities in which it has been held, that an action will lie, even though the conviction is good in point of form, if it is not supported by the truth and justice of the case. There was one in Shropshire, before Gould, J., where the plaintiff had been convicted upon the game laws, and the conviction itself was good in point of form; but the party was not, in truth, an object of the game laws; whereupon Gould

directed the jury to find for the plaintiff, which they accordingly did. There was another case in Lancashire, before Mr. Justice Gould, to the same effect. In criminal cases, it is clear, that the conviction being good in point of form is no protection to the justice; and, if not, why should it be so in a civil action? If he convict illegally, he ought not to be sheltered, and an action is the only mode of redress to the party injured. But, if the formality of the conviction is to be an answer to the action, the party injured would be without redress, where he would be most entitled to it; because the caution of the justice, to be correct in form, would increase in proportion to his intention to act illegally. In Brucklesbury v. Smith, 2 Burr. 656, every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat, 7 Jac. 1, c. 5, which enables justices of peace to plead the general issue, and give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal: or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause of demurrer. Since the statute, his defence must be equally good in evidence: for the statute does not vary the law; it is only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal. Secondly, upon the merits: the words of the stat. 29 Car. 2, c. 7, are, "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, works of necessity and charity only excepted." In Rex v. Cox, 2 Burr. 786, the court held, "that baking puddings and pies was within the exception:" and, if so, why should not the baking rolls be so too? But what is decisive is, that the stat. 29 Car. 2, c. 7, gives no summary form of conviction; whereas the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of form, therefore, all four are bad. Lastly, supposing they were good in form, the three last are an excess of the justice's jurisdiction; for the offence created by the statute is, "exercising his calling on the Lord's day." If the plaintiff, therefore, had continued baking from morning till night, it would still be but one offence. Here there are four convictions for one and the same offence; consequently, as to three, there is an excess of jurisdiction; and if so, all is void, and *coram non judice*: and an action will lie, not only against the justice, but likewise against the officers. To this point he cited Hardres, 484, and concluded by praying judgment for the plaintiff.

Mr. T. Cowper, contra, for the defendant, contended, 1. That by the bare production of the conviction at the trial the cause was at an end, and the Court estopped from any further inquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction in a matter of which the justice had jurisdiction, must be removed by certiorari and quashed, before it can be questioned at Nisi Prius. If he has no jurisdiction, no doubt but all is coram non judice and void. But here the justice had jurisdiction; and if so, with deference to the opinion of Mr. Justice Gould, in the case tried before him in Shropshire, the conviction, as to the matter of fact contained in it, is conclusive in favour of the justice in an action, though it is not so in an information. If it were not, instead of the mischief to be apprehended from the oppression of the justice, no one would act in the commission. 2. As to the objections which have been taken to the convictions in point of form, he said, it would be time enough to answer them when the convictions were removed and stood in the paper for argument. At present it was sufficient to observe that they continued as so many judgments on record, and, as such, conclusive, till reversed by appeal, or quashed by this court. He agreed the stat. 7 Jac. 1, c. 5, did not vary the law; but insisted, that before that statute, it would have been a good plea for the defendant to have stated that the plaintiff was convicted, &c., as in this case; and if the plaintiff had traversed the conviction, the defendant might have demurred. The sole ground and object of taking away the certiorari in the several acts of parliament for that purpose, was to prevent vexatious suits against justices for mere informalities in their proceedings. But they still remain liable to an information if they wilfully act wrong. This Court has often lamented, when obliged to quash a conviction for want of form, because it opens a door to an action.

As to this being but one continued offence, it might be, that

it was carried on at four different places; for there is evidence of four different acts, and the Court will not presume the contrary against the justice. But, if the nature of the offence is such, that it could only be committed once in the same day, still the plaintiff has no remedy, while the convictions are in force, but by removing them into this court to be quashed for illegality.

Lord Mansfield. — May there not be this point, that the justice had no jurisdiction, after convicting the plaintiff in the first penalty? The act of parliament gives authority to punish a man for exercising his ordinary calling on Sunday. The justice exercises his jurisdiction, by convicting him in the penalty for so doing. But then, he has proceeded to convict him for three other offences in the same day.

Mr. Cowper. — If he has done so, it is only a ground for quashing the convictions; but no priority appears to give legality to one in preference to the other.

Lord *Mansfield*.—This point you agree in; that if the justice had no jurisdiction, it is open to inquiry in an action. Now, if there are four convictions, for one and the same offence committed on one and the same day, three of them must necessarily be bad; and, if so, it does not signify as to the merits of the action which of the four is legal, or which illegal.

I do not remember that at the trial it was contended the plaintiff would be entitled to recover if the convictions were informal; or that any objection was taken to their formality there. The single question intended to be tried was, whether there could be more than one penalty incurred for exercising a man's ordinary calling on one and the same Sunday? As to that there can be no doubt: the only doubt was, whether that objection could be taken at the trial before the convictions were quashed. In the extent in which the argument upon that point has proceeded, it is a matter of considerable consequence; and, as a general question, I should be glad to think of it.

Aston, J.— The Court will never grant an information unless

Aston, J.— The Court will never grant an information unless the conviction is quashed. Rex v. Heber, 2 Str. 915. As to the general question before the Court, suppose the justice were to convict for a single offence, where no offence at all had been committed, would not an action lie in that case? If it would, why not in this, where there are four convictions for one and

the same offence? It seems to me that the baking every roll might as well have been charged as a separate offence.

Cur. alr. rult.

Afterwards, on Wednesday, June 18th in this term, Lord Mansfield, after stating the case at large, delivered the unanimous opinion of the Court as follows: - Upon the trial of this cause, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reason; because, by the state I have of them, they appear different from the warrants; for the convictions take no notice of any summons (u), nor of any informations, nor of any evidence (b)upon oath given; though the warrants take notice of a summons, of the defendant's not appearing to that summons, of an information laid, and evidence given upon oath. This objection would have gone to all the four cases equally, but at the trial no objection whatever was made to the first conviction or warrant. But the objection made was this; that, allowing the first conviction and warrant to be good, the three others were an excess of the jurisdiction of the justice, and beyond it; for that on the true construction of the stat. 29 Car. 2, c. 7, there can be but one offence, attended with one single penalty, on the same day.

In answer to this it was objected, on the part of the defendants, that no such objection could be taken to the convictions till after they had been quashed in this court; and that if a case were to be made with regard to that, it must be taken upon the question, whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the court on the present case are, first, "whether, in this action, and before the convictions were quashed, an objection could be made to their legality? If the court should be of opinion no objection could be made, then a nonsuit to be entered up; but in case the objection might be made, then, 2ndly, whether the levy made under the three last warrants could be justified?" The first question

⁽a) Nor that the defendant made default. See R. v. Allington, 2 Str. (b) See R. v. Lovett, 7 T. R. 152; R. v. Theed, 2 Str. 919; R. v. Smith, 8 T. R. 588.

Stone, 1 East 649.

is, "whether any objection can be made to the legality of the convictions before they were quashed." In order to see whether it can, we will state the objection: it is this; that here are three convictions of a baker, for exercising his trade on one and the same day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence law. On the construction of the act of parliament, the offence is "exercising his ordinary trade upon the Lord's day;" and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or a number of particular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence, on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute: but singly to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the three last convictions. How then can there be a doubt, but that the plaintiff might take this objection at the trial? 2ndly. With regard to the form of the defence, though the stat. 7 Jac. 1, c. 5, enables justices of peace to plead the general issue, and give the special matter in evidence; in doing so, it only allows them to give that in evidence, which they must before have pleaded; and, therefore, they must still justify. But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: that, because the plaintiff had been convicted of one offence on that day, therefore the justice had convicted him in three other offences for the same act. By law that is no justification: it is illegal on the face of it; and, therefore, as

was very rightly admitted by the counsel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged. Most clearly, then, it was open to the plaintiff upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that respect, they should all four be held bad; but it goes upon the ground, that the offence itself can be committed only once in the same day. We are, therefore, all clearly of opinion, that if there was no jurisdiction in the justice, the same might have appeared at the trial; of course, we are of opinion that this objection might have been made, and that the objection itself, in point of law, is well founded.

Per Cur. Postea to be delivered to the plaintiff.

[Subject to the act for the protection of justices, 11 & 12 Vict. c. 44, a summary of which will presently be given, | the rule is the same — whether the conviction appear on the face of it to be for an offence not within the magistrate's jurisdiction — or to be for an offence within the magistrate's jurisdiction, but defective for want of the circumstances necessary to a conviction for that offence, Grifiths v. Harries, 2 M. & W. 335; see Lancaster v. Greaces, 9 B. & C. 628; Morgan v. Hughes, 2 T. R. 225; Fearnley v. Worthington, 1 M. & G. 491; Hardy v. Ryle, 9 B. & C. 603; Groome v. Forrester, 5 M. & S. 320; — or of a sufficiently specific statement of them, Neuman v. Earl of Hardwicke, 8 A. & E. 127; R. v. Read, 9 A. & E. 619; for, as was observed in Lancaster v. Greaces, though the conviction is conclusive upon matter of fact, and, if the defendant mean to rely on matter of fact, he should make his defence at the time, the rule is not so as to matter of law.

So if the conviction of two persons be joint for offences ex necessitate reiseveral, it will be void, and (subject now to the act above mentioned) they may sue in trespass if it be acted upon, Morgan v. Brown, 4 A. & E. 515. And the rule is the same in the case of a single conviction of one person for two distinct offences, Newman v. Bendyshe, 10 A. & E. 11.

But "a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it," Brittain v. Kinnaird, 1 B. & B. 482; per Dallas, C. J. In that case trespass was brought against justice for taking a boat; in their defence they relied on a conviction which warranted them in doing so. The plaintiff offered evidence to controvert the facts stated in the conviction, but it was held not to be admissible. Accord. Basten v. Carew, 3 B. & C. 649; Favcett v. Fowles, 7 B. & C. 394; Gray v. Cookson, 16 East, 13; Lowther v. Earl Radnor, 8 East, 113; Ashcroft v. Bourne, 3 B. & Ad. 684; R. v. Bolton, 1 Q. B. 66; [Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417; 43 L. J. P. C. 39;]

and the same attribute, viz., that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent tribunal, Aldridge v. Haines, 2 B. & Ad. 395; and the cases cited by Coleridge arguendo; [see also the Whitbury-on-Severn Union Case, 4 E. & B. 321; De Cosse Brissac v. Rathbone, 6 H. & N. 301; Kemp v. Neville, 10 C. B. N. S. 549; 31 L. J. C. P. 163. Ex parte Lamert, 33 L. J. Q. B. 69.]

Even when the conviction had been quashed it was provided by the 43 G. 3, c. 141, that the party convicted, in an action against the justices, which was required to be on the case, should only obtain two pence damages, besides the amount of the penalty if levied, and no costs of suit, unless he expressly averred malice and want of probable cause; and that he should not recover the amount of the penalty if the defendant proved him to have been guilty of the offence of which he had been convicted, and that he had undergone no greater punishment than was by law assigned thereto. And it was held under this act that he must at the trial prove not merely his own innocence of the offence of which he was convicted, but also what took place before the justice at the time of conviction, in order that it may appear whether there was probable cause or no, Burley v. Bethune, 5 Taunt. 580. See Baylis v. Strickland, 1 M. & Gr. 591.

But the stat. 43 Geo. 3, c. 141, is now repealed by the 11 & 12 Vict. c. 44, intituled, "An act to protect justices of the peace from vexatious actions for acts done by them in the execution of their office," the first section of which provides that every action to be brought against any justice after the 2nd of October, 1848, for any act done by him in the execution of his duty as such justice, as to any matter within his jurisdiction, [see Sommerville v. Mirehouse, 1 B. & S. 652; Lawrenson v. Hill, 10 Irish C. L. R. 177; Gelen v. Hall, 2 H. & N. 379, shall be on the case, and the declaration shall allege the act to have been done maliciously and without reasonable and probable cause, and if such allegation be not proved upon the plea of the general issue, the plaintiff shall be nonsuited, or a verdict shall be given for the defendant. See Kendall v. Wilkinson, [4 E. & B. 680;] 24 L. J. M. C. 89; [semble, in cases within this section, the action may be maintained without the conviction or order being quashed, per Lord Campbell, C. J., R. v. Wood, 5 E. & B. 58; and see Lawrenson v. Hill, supra. Quære, however, whether notwithstanding this act the justice, for acts done in the execution of his office, might not claim the protection extended generally to judicial acts, even though the act was done maliciously. See the cases as to judges cited ante, at the end of notes to Mostyn v. Fabrigas.

But when the act is done by the justice in a matter, of which he has no jurisdiction, [as in Crepps v. Durden] or where he exceeds his jurisdiction, he may, by section 2, be sued as before the statute, except where the act complained of has been done under a conviction or order, in which case "the conviction" (sic in statute) must be first quashed—or if done under a warrant for appearance followed by a conviction or order, the conviction or order must be first quashed—[or if such warrant be not followed by conviction or order or be upon information for an indictable offence, still no action can be maintained if a summons was previously served and disobeyed]. See, as to the construction of this section, Leary v. Patrick, 15 Q. B. 266; Newbould v. Coltman, 6 Exch. 189; Haylock v. Sparke, 1 E. & B. 471; [Pease v. Chaytor, on demurrer, 1 B. & S. 658; 31 L. J. M. C. 1; on motion, 3 B. & S. 620; Pedley v. Davies, 10 C. B. N. S. 492; 30 L. J. C. P. 374; Bessell v. Wil-

son, 1 E. & B. 489; Lowrenson v. Hill. 10 Ir C. L. R. 177; Lalor v. Bland, 8 Ir. C. L. R. 115; and Bott v. Acroyd, Q. B. 28 L. J. M. C. 207, where the objection to a conviction and warrant of commitment was that the justices had signed it leaving blanks for the amount of costs, but this omission was held, in an action for false imprisonment against the justices brought after the conviction had been quashed, to be an erroneous exercise of jurisdiction only, and not an excess.]

The summons mentioned in the statute, the non-attendance upon which is to bar the maintenance of an action, is a summons before conviction; the section does not apply to a summons and warrant issued after conviction, with a view to the levying of the penalty imposed, Bessell v. Wilson, 1 E. & B. 489. In Barton v. Bricknell, 13 Q. B. 393, an action of trespass was brought against a justice for wrongfully seizing the plaintiff seconds. It appeared that the defendant had convicted the plaintiff under the 29 Car. 2, c. 7 (for Sunday trading), in a penalty and costs to be levied by distress. The conviction directed that in case of non-payment, and if there should be no distress, the plaintiff should be put in the stocks for two hours, unless the penalty and costs were sooner paid. The goods of the plaintiff were distrained, and the conviction was quashed on account of the illegal alternative contained in it, as to the stocks. It was held that the defendant was protected under sect. I of this statute, and that sect. 2 did not apply, as the defendant had jurisdiction to order the distress, in respect of which alone the action was brought.

Sect. 3 protects a justice bonî fide granting a warrant upon the conviction of another justice, which is defective for want of jurisdiction, and makes the convicting justice alone liable.

Sect. 4 prohibits actions by parties rated to the poor, though not liable to be rated, or in respect of any defect in such rate against the justices issuing a distress warrant thereon,—and further provides that the exercise of discretionary powers vested in a justice by statute, shall not furnish ground of action.

By sect. 5 (if a justice refuses to do any act relating to the duties of his office], the Court of Queen's Bench [may order him to do the act, and he will not be] liable to [any proceeding for having obeyed the order. It has been held that this section only applies if the act be one by which the justices incur liability, Reg. v. Perey, L. R. 9 Q. B. 64, but in the later case of Reg. v. Phillimore, 14 Q. B. D. 474, note, the court considered that this rule would narrow the operation of the statute too much, though they declined to lay down any absolute rule as to when the proceeding should be under this section, and when by mandamus.] The court acts upon this section where justices refuse to determine a case over which they have jurisdiction, [and a mandamus to them to hear and determine the case would issue, R. v. Cotton, 15 Q. B. 569; R. v. Justices of Bristol, 18 Jur. 426, in notâ; S. C. 3 E. & B. 479, in notâ; R. v. Paynter, 7 E. & B. 328; R. v. Dayman, ib., 672; R. v. Dunn, 7 E. & B. 220; but not where the refusal is merely formal, and made for the purpose of eliciting the opinion of the court, and deciding the case according to the opinion given, R. v. Paynter; R. v. Dayman.

It is sometimes a nice question whether the justices have declined jurisdiction, or whether they have adjudicated, R. v. Brown, 7 E. & B. 757; R. v. Paynter; R. v. Dayman; R. v. The Mayor, &c., of Rochester, 7 E. & B. 910; R. v. Wood, 5 E. & B. 49; and R. v. Padwick, 8 E. & B. 704, in which case the dismissal by quarter sessions of an appeal for want of jurisdiction was

held to be a decision within the meaning of 12 & 13 Vict. c. 45, s. 5. See also *Carr* v. *Stringer*, E. B. & E., where, though an appeal did not lie, yet the court entertained the question so far as to examine whether they had jurisdiction, and to give costs to the respondent: and see *Ex parte Monroe*, 8 E. & B. 822].

But the court refused to make an order, directing justices to issue a warrant of distress, where the liability of the person against whom it was sought appeared seriously doubtful, R. v. Browne, 13 Q. B. 654. [Orders to issue warrants of distress were made in R. v. Justices of Kingston-upon-Thames, E. B. & E. 256; R. v. Bradshaw, 29 L. J. M. C. 176; R. v. Eastern Counties Rail. Co., 5 E. & B. 974; R. v. Lindford, 7 E. & B. 950; R. v. Boteler, 33 L. J. M. C. 101; R. v. Higginson, 31 L. J. M. C. 189; In re Hartley, 31 L. J. M. C. 232;—to sign an order for the preferment of an indictment in R. v. Arnold, 8 E. & B. 550.] On a motion against a magistrate under this section, the general rule is, that the court will order the unsuccessful party to pay costs, and will not, on the motion for costs, enter into the merits of the original application, R. v. Ingham, 17 Q. B. 884.

Sect. 6 makes the confirmation of a conviction or order on appeal a protection to a justice who issues a warrant upon it either before or after such confirmation.

Sect. 7 empowers a judge to set aside the proceedings in any action brought against a justice contrary to the provisions of the act: and every action against justices must be brought within six months after the act complained of (sect. 8), and not until after a month's notice in writing, &c. (sect. 9), [the notice must be given, although the cause falls within the first section of the act, Kirby v. Simpson, 10 Exch. 358. In cases within that section the notice should show that the act charged was malicious, Taylor v. Nesfield, 3 E. & B. 724. It] may be given before the quashing of the order, the act complained of being the cause of action, although the action itself cannot be brought until after the quashing, Haylock v. Sparke, 1 E. & B. 471.

Sect. 10 makes the *venue* in the action local [(quarre as to the effect of the Judicature Acts, 1873, 1875, which abolish generally local venues, except where otherwise provided by statute, Ord. XXXVI. Rule 1, but provide, Ord. XIX. Rule 12, that every defence of not guilty by statute shall have the same effect as heretofore)], and gives the defendant an option to plead the general issue, and under it prove the special facts, and also gives him the privilege of exemption from the jurisdiction of the county court. [See Weston v. Sneyd, 1 H. & N. 703.]

By sect. 11 a recovery of less than the amount tendered or paid into court gives him a verdict with the security of the sum paid into court for his costs; and by sect. 12 the verdict is to be against the plaintiff, or he is to be non-suited, if he has not complied with the above-mentioned preliminaries.

Sect. 13 provides that the plaintiff shall not in any case recover more than two pence damages where it appears that he was guilty of the offence of which he was convicted, or liable by law to pay the sum ordered to be paid, and that he has undergone no greater punishment than that assigned by law to the offence of which he was convicted, or for non-payment of the money ordered to be paid.

By sect. 14 the plaintiff is to have costs, as before the act, and where the act complained of is stated to have been done maliciously, &c., they are to be taxed as between attorney and client, and in all cases where there is judgment against him he is to pay costs as between attorney and client.

Such is a summary of the provisions of this important statute.

The conviction, or order! may be drawn up at any time before it is returned to the quarter sessions [see the 11 & 12 Vict. c. 43, s. 14, so that though it may be informal at first, the magistrate has an opportunity of amending it; and it has been declared to be not only legal but laudable so to do. R. v. Barker, 1 East, 186. Unless, indeed, it have been quashed or its invalidity otherwise ascertained by the decision of a superior court, as for instance, by the Queen's Bench on Habeas Corpus, Changy v. Paym., 1 Q. B. 725. But it would seem that after an invalid conviction has been filed at sessions, another might be substituted, R. v. Richards, 5 Q. B. 926. But the rule is different in case of an order, R. v. Justices of Cheshire, 5 B. & A. 439. [And see as to the amendment of orders made by justices, 12 & 13 Vict. c. 45, s. 7; R. v. Higham, 7 E. & B. 557; R. v. Lundie, 31 L. J. M. C. 157. Even in the case of a conviction, where a rule nisi had been obtained for a certiorari to bring up a bad conviction, and after the conviction had been returned to the clerk of the peace and filed, the magistrate drew up a fresh and corrected conviction, it was held that the certiorari should go, Ex parte Austin, 50 L. J. M. C. 8.]

In Griffith v. Harries, 2 M. & W. 335, it was stated by Baron Parke, that in a case of Dimsdale v. Clarke, A.D. 1829, he and Mr. J. Littledale differed from Mr. J. Bayley on the question whether it be necessary that the magistrate's jurisdiction should appear afirmaticely on the conviction, Mr. J. Bayley thinking that it need not; but see Day v. King, 5 A. & C. 359; R. v. Levis, 8 A. & E. 885.

As the law regarding summary convictions before justices is of great and daily increasing importance, on account of the immense variety of subjects which fall within this sort of jurisdiction, it seems advisable to [make some general remarks on it].

A conviction before a justice or justices of the peace without the intervention of a jury is always under some statute; the common law knows of no such proceeding. It [has been] regarded by the courts with no particular favour, and [formerly the justice was obliged], on the record of it, to show [in detail] that he had proceeded recto ordine. So much precision was required in drawing it up, that magistrates and their clerks were under considerable difficulty, and ran considerable risk in framing it. For their case and protection stat. 3 Geo. 4, c. 23, provided a general form [which, however, was only applicable where no particular form had been given, and required the evidence to be set forth. This statute has been repealed, and nearly all difficulty in framing a conviction removed, by one of the three Jervis's acts relating to justices acting out of quarter sessions (the third of which, 11 & 12 Vict. c. 44, has been above epitomised), namely by the Summary Convictions and Orders Act, 11 & 12 Vict. c. 43, which gives short forms of convictions and of proceedings to obtain and enforce them], and does away with the effect of variances and defects both in substance and form in [several parts of] the proceedings themselves. [This act, with the acts of 42 & 43 Vict. c. 49 and 47 & 48 Vict. c. 43, and any future acts amending these acts. are now to be styled "The Summary Jurisdiction Acts," see 42 & 43 Vict. c. 49, s. 50. For the forms contained in the Schedule to 11 & 12 Vict. c. 43 others have been substituted by the rules drawn up under s. 29 of 42 & 43 Vict. c. 49 and ss. 4, 12 of 47 & 48 Vict. c. 43. See post, p. 711.]

The first section [of 11 & 12 Vict. c. 43] directs that in all cases where an information (which need not be on oath unless a warrant issues in the first

instance, sect. 10) is laid before a justice or justices, or complaint made (which need not be in writing unless the statute require it, sect. 8), a summons may issue according to the form in the schedule [as to the mode of service, see per Quain, J., Reg. v. Smith, L. R. 10 Q. B. 609; and by sect. 2, in case of non-appearance, upon proof on oath of due service of the summons, what shall be deemed by the justice a reasonable time before the appointed day, [see Reg. v. Smith, L. R. 10 Q. B. 604,] he may, upon the information or complaint being substantiated on oath, issue his warrant according to the form in the schedule: or in cases of convictions, where the original information is upon oath, he may issue such warrant in the first instance, or in cases where a summons issues without appearance, upon proof on oath of due service, a reasonable time (not as in case of issuing a warrant what shall be deemed by the justice a reasonable time) before the day appointed he may proceed ex parte, and adjudicate; and it is provided by sect. 1,—that no objection shall be allowed to any information, complaint or summons for any alleged defect therein "in substance or in form," — or for any variance in the evidence; but if considered by the justice prejudicial to the defendant, the case may be adjourned. [See Whittle v. Frankland, 31 L. J. M. C. 81. Where the summons was for drunkenness and riotous behaviour, contrary to a special act, a conviction for drunkenness only was quashed, Martin v. Pridgeon, 28 L. J. M. C. 179; and see R. v. Brickhall, 33 L. J. M. C. 156.

Sect. 3 contains a similar provision as to warrants, with a similar power of postponement, and in the meanwhile commitment or enlargement upon recognizances according to forms in the schedule.

Sect. 4 directs the mode in which the ownership of property is in certain cases to be stated.

Sect. 5 makes aiders and abettors in the commission of offences punishable by summary conviction liable to the same punishment as principles.

Sect. 6 extends the provisions of 11 & 12 Vict. c. 42, to this act, [but is not controlled by the 35th sect. of 11 & 12 Vict. c. 42, see 26 & 27 Vict. c. 77. Bradford Union v. Clerk of the Peace for Wilts, L. R. 3 Q. B. 604; 37 L. J. M. C. 129.]

Sect. 7 gives the justice power to enforce the attendance of any material witness within his jurisdiction, in the same manner as a defendant, and to commit for seven days any witness refusing to be sworn or to answer.

Sect. 11 gives six months after the cause has arisen, in the absence of special enactment, as the time for complaint or information. [See Eddleston v. Francis, 7 C. B. N. S. 568; Labalmondiere v. Addison, 1 E. & E. 41: Reeve v. Yeates, 1 H. & C. 435; Morant v. Taylor, 1 Ex. D. 188, 45 L. J. M. C. 78; Coggins v. Bennett, 2 C. P. D. 568.]

Sects. 12 (slightly modified by 47 & 48 Vict. c. 43, s. 4,) 13 (also similarly modified), 14, and 16 (also modified as above), contain precise directions as to the mode in which the hearing upon complaint and information is to be conducted. [As to s. 14, see Ex parte Hayward, 32 L. J. M. C. 89; Davis v. Scrace, L. R. 4 C. P. 172; 38 L. J. M. C. 79; Morgan v. Hedger, L. R. 5 C. P. 435; Reg. v. Hutchins, 5 Q. B. D. 353; and as to s. 16, see Gelen v. Hall, 2 H. & N. 739.]

The seventeenth section provided for the use of the forms of convictions and orders in the schedule to the act; [but by the Summary Jurisdiction Act, 1884, s. 55, is repealed so much of this section "as specifies any form of conviction or order for which another form is provided by a rule under the Summary Jurisdiction Acts." The validity of forms so provided is established by s. 29 of the Summary Jurisdiction Act, 1879, explained by s. 12 of the

Summary Jurisdiction Act, 1884, and the rules and forms now in force will be found in the Weekly Notes of Oct. 9, 1886. By rule 31 it is provided that the forms in the schedule to the rules or forms to the like effect may be used with such variations as the circumstances may require. By rule 32, the forms in the schedule to 11 & 12 Vict. c. 43, are annulled. It will be seen that — in convictions (part I., forms 11-17) neither (1) the information — (2) the summons — 3 the appearance or non-appearance of the defendant are to be mentioned — and (4) the evidence is not to be set forth.

The requisites of a conviction, which formerly must have been recorded in it, are:—]

1. The information, which [has been usually stated to be absolutely essential in all cases, excepting where the justice is empowered to convict on view (see 1 Wm. Saund. 262, note, Jones v. Owen, 2 D. & R. 600). It [has been regarded as the foundation of his jurisdiction over the case, without which his proceeding would be void (see R. v. Bolton, 1 Q. B. 66), (Blake v. Berch, 1 Ex. D. 320, 45 L. J. M. C. 111; and though some of the dicta in Reg. v. Hughes, 4 Q. B. D. 614, 48 L. J. M. C. 151, appear somewhat inconsistent with this view, the decision seems merely to negative the necessity of any formal information where not required by statute'. The same principle applies to other limited jurisdictions created by statute; thus, a presentment is the foundation of the jurisdiction of commissioners of sewers, and if there be not one their rate is void, Wingate v. Waite, 6 M. & W. 739; and see the judgment in Doc v. Bristol and Exeter Rail Co., 6 M. & W. 320; R. v. Croke, Cowp. 26; and Christie v. Unwin, 11 A. & E. 373, where the same principle was held to apply even to the exercise of an authority conferred by statute on the chancellor; see also R. v. Guardians of Hartley Union, 1 B. B. 677; [Lee v. Rowley, 8 E. & B. 857; and In Re Hopper v. Warburton, 32 L. J. Q. B. 104.7

The information need not have been in writing or even on oath, unless expressly directed by an act of parliament to be so. Basten v. Carew. 3 B. & C. 649; [Reg. v. Hughes, 4 Q. B. D. 614, 48 L. J. M. C. 151]. By the 11 & 12 Vict. c. 43, s. 10, whenever the justice issues a warrant in the first instance without summons, the information must be upon oath.

[Objections cannot now usually be taken to the information for defects in substance, or form, or for variances between it and the evidence, 11 & 12 Vict. c. 43, ss. 1 and 9; still.] care should be taken in framing it, since it [has been usually considered to be] the foundation of the magistrate's jurisdiction, Cave v. Mountain, 1 M. & Gr. 257; Carpenter v. Mason, 12 A. & E. 629.

When there is no act giving a particular form, it is sufficient if the jurisdiction is substantially made apparent in the documents, or can be inferred therefrom, Taylor v. Clemson, per Tindal, L. C. J., 2 Q. B. 1032; [see Exparte Baker, 7 E. & B. 697]. Before the 11 & 12 Vict. c. 43 [ss. 1 & 9, the evidence would not] supply omissions in the information, for the office of the evidence is to prove, not to supply a legal charge. R. v. Wheatmain. Dougl. 232; Wiles v. Cooper, 3 A. & E. 528. It should state—the day on which it is exhibited; and the statement of a day inconsistent with, or insufficient to warrant the conviction, formerly vitiated it. R. v. Kent, 2 Lord Raym. 1546.

It should state — the place of exhibiting, that the magistrate may appear to have been acting within his jurisdiction, see R. v. Kite, 1 B. & C. 101; and R. v. Martin, 2 Q. B. 1037; Re Peerless, 1 Q. B. 143.

The name of the informer should, it seems, be set forth, that the defendant

may know who is accusing him; in some cases, at all events, it is necessary, see $R. \ v. \ Stone, \ 2 \ Lord \ Raym. \ 1545.$

It should state — the name and style of the convicting justice or justices, and show that he is acting within his jurisdiction. See Kite's Case, 1 B. & C. 101; R. v. Martin, 2 Q. B. 1036; Re Peerless, 1 Q. B. 143; R. v. Inhabitants of St. George, Bloomsbury, 4 E. & B. 520. Thus it [was before the statute above mentioned held not to] be enough to state that he is justice in the county, without stating that he is of or for the county, R. v. Dobbyn, Salk. 473; — the name of the offender or offenders, R. v. Harrison, 8 T. R. 508; the time of the offence, so that the information may appear to have been laid in due time, R. v. Pullen, Salk. 369; R. v. Chandler, Salk. 378; R. v. Crisp, 7 East, 389; — the place, that it may appear to have been within the justice's jurisdiction, Kite's Case, 1 B. & C. 101, et notam; — lastly, the charge should be set forth with proper and sufficient certainty, and contain every ingredient necessary to constitute the offence, leaving nothing to mere inference or intendment. "A conviction," to use the words of Lord Holt, "must be certain, and not taken by collection," R. v. Fuller, 1 Lord Raym. 509; R. v. Trelawney, 1 T. R. 222.

Generally speaking, it is sufficient to state the offence in the words of the act creating it; see R. v. Speed, 1 Lord Raym. 583; Davis v. Nest, 6 C. & P. 167; Ex parte Pain, 5 B. & C. 251; [In re Perham, 5 H. & N. 30; Walsby v. Anley, 30 L. J. M. C. 121; and by 42 & 43 Vict. c. 49, s. 39, sub-s. 1, it is expressly enacted with reference to proceedings before courts of summary jurisdiction that "The description of any offence in the words of the act, or any order, bye-law, regulation, or other document creating the offence, or, in similar words, shall be sufficient in law."] Cases, however, may occur in which the words of the statute are so general as to render some more certainty in the conviction necessary; per Denison, J., R. v. Jarvis, 1 Burr. 154; Ex parte Hawkins, 2 B. & C. 31; R. v. Perrott, 3 M. & C. 379.

[Previously to the passing of 11 & 12 Vict. c. 43, it was held that] exceptions in the statute creating the offence should be negatived where they appear[ed] in the clause creating the offence, R. v. Clarke, 1 Cowp. 35; R. v. Jukes, 8 T. R. 542; though it [was] otherwise when they occur[red] by way of proviso in subsequent clauses or statutes, Cathcart v. Hardy, 2 M. & S. 534; Spiers v. Parker, 1 T. R. 141; R. v. Hall, 1 T. R. 320.

The 11 & 12 Vict. c. 43, s. 14, enacts, that whenever in cases of summary convictions the information or complaint negatives any exception, proviso, or condition, it shall not be necessary for the complainant to prove the negative, but the defendant may prove the affirmative in his defence. [See Tennant v. Cumberland, 1 E. & E. 401; Davis v. Scrace, L. R. 4 C. P. 172; 38 L. J. M. C. 79; Morgan v. Hedger, L. R. 5 C. P. 485; and by 42 & 43 Vict. c. 49, s. 39, sub-s. 2, it is further provided that in proceedings before courts of summary jurisdiction, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."]

There are many cases where technical words, that would be necessary in an indictment for the same offence, are unnecessary in a conviction; see R. v. Chandler, 1 Lord Raym. 581; R. v. Marsh, 2 B. & C. 717.

Although the information must, in order to give the magistrate jurisdiction, state an offence of which he has a right to take cognisance, it need not state evidence sufficient to support such a charge, for it is the *charge* which gives the jurisdiction, *Care* v. *Mountain*, 1 M. & G. 261; R. v. Bolton, 1 Q. B. 66.

2. That the defendant was summoned or brought up by warrant; for it would be contrary to natural justice to convict without giving him an opportunity of being heard, Painter v. Liverpool Gas Co., 3 A. & E. 433; and see R. v. Totness, 7 Q. B. 690; [R. v. Lightfoot, 6 E. & B. 822; Gooper v. The Bourd of Works for the Wandsworth District, 32 L. J. C. P. 185; Labalmondiere v. Frost, 1 El. & El. 527; 28 C. J. M. C. 155; Blake v. Beech, 1 Ex. D. 320, 45 L. J. M. C. 111; but, as before stated, the summons need not, according to the form of convictions given by the present Rules, be mentioned in it.

A general form of summons is given (part L. form 2.) in the Summary Jurisdiction Rules, 1886, mentioned above.] In some cases an act requires a summons of a particular kind, and in those the justices have no jurisdiction if it be omitted; thus, where the summons was to be ten days at least before conviction, and it was served on the 20th to appear on the 30th, the conviction was held void, Mitchell v. Foster, 9 Dowl. 527; 12 A. & E. 472. Where there is no statutable provision the summons should give him reasonable time, R. v. Mallinson, 2 Burr. 679; R. v. Johnson, 1 Str. 261; [see In re-Williams, 21 L. J. 46].

If, indeed, he appear of his own accord, that will dispense with a summons, R. v. Stone, 1 East, 649. See R. v. Justices of Wiltshire, [12 A. & E. 793; and appearance and defence cures all defects in the summons, R. v. Johnson, supra; see R. v. Berry, 28 L. J. M. C. 86; Blake v. Beech, 1 Ex. D. 320, 45 L. J. M. C. 111; and see Rey. v. Hughes, 4 Q. B. D. 614, 48 L. J. M. C. 151].

If a summons be ineffectual, a warrant may, at least in some cases, be issued; see *Bane v. Methowen*, 2 Bing. 63: but then the information ought to have been upon oath; see *R. v. Payne*, Comberb. 359; *per* Holt. Barnard. 34; and it is the opinion of Mr. Parley that a warrant (in the absence of express enactment) lies only when the offence involves some breach of peace, Paley, 37, [6th ed. p. 95]. The 11 & 12 Vict. c. 42, now authorises justices to issue a warrant to compel appearance in all cases of summary convictions or orders. [The warrant or summons is not avoided by reason of the justice, who signed the same, dying or ceasing to hold office, 42 & 43 Vict. c. 49, s. 37.]

- 3. The appearance or non-appearance of the defendant. [This need not now, according to rules above referred to, be stated in the conviction.] If, being summoned, he do not appear, he may nevertheless be convicted, for otherwise any defendant might escape merely by not appearing, R. v. Simpson, 1 Str. 44; and see 11 & 12 Vict. c. 43, ss. 2, 13, which enable the justice to convict on default of appearance, or to issue a warrant to compel appearance and adjourn the case, R. v. Kingsby, 15 J. P. 65; Cowp. 30.
- 4. If the defendant confess, [the confession must formerly have been] stated, [but see now the forms in the Rules 1886. If he does so, there is] no necessity for evidence, R. v. Hall, 1 T. R. 320; R. v. Clarke, Cowp. 35; even though the statute direct the conviction to be "on the oath of one or two credible witnesses": see R. v. Hall, ubi supra; R. v. Gage, Stra. 546, and 1 Wms. Saund. 262, note; see 11 & 12 Vict. c. 43, s. 14 [and 42 & 43 Vict. c. 49, s. 13], under which the justice may convict the defendant at once. or

make an order against him if he admit the truth of the information or complaint.

- 5. If the defendant [did] not confess, the evidence must [have been] set forth, [but should not be now, according to the forms given by the Rules of 1886]. It should be given in his presence. It is not necessary, in order to warrant the conviction, that the justices should clearly have come to a right decision in point of fact. If there was evidence from which any reasonable person might have drawn the same inference as they did, they will do, R. v. Glossop, 4 B. & Ad. 616; Anon., 1 B. & Ad. 382. Indeed, the magistrate being substituted for a jury, his decision cannot be said to be wrong if the evidence was such as might have been left to a jury, and from which they might have drawn the same conclusion, R. v. Davis, 6 T. R. 178.
- 6. There must be a judgment and an adjudication of the proper forfeiture, see R. v. Harris, 7 T. R. 238; R. v. Salomons, 1 T. R. 251; R. v. Hawkes, Str. 858; [R. v. Crickland, 7 E. & B. 866; R. v. Williams, 18 Q. B. 393; and Labalmondiere v. Frost, 1 El. & El. 527; 28 L. J. M. C. 155, S. C.; In re Baker, 2 H. & N. 219. There is, however, no particular form of judgment, R. v. Thompson, 2 T. R. 18. And the adjudication may be good in part though it exceed the jurisdiction of the justices, provided the excess be severable, R. v. Justices of Wiltshire, 12 A. & E. 793; R. v. St. Nicholas, 3 A. & E. 79. Cross v. Watts, per Byles, J., 13 C. B. N. S. 247, 248; 32 L. J. C. P. 73.] application of the penalty, where the act directs any mode of applying it, [has been held to be] a necessary part of the judgment, Chaddock v. Wilbraham, 5 C. B. 645: [but at any rate in most cases it would be sufficient to follow the forms in the schedule to the rules of 1886, which do not provide for the application of the penalty.] When [however] the statute leaves the application discretionary the mode in which the discretion was exercised ought [it would seem] to be stated, R. v. Dempsey, 2 T. R. 96. Where the justice is to give costs or charges, he must ascertain their amount in the conviction, R. v. Symons, 1 East, 189; [Bott v. Acroyd, 28 L. J. M. C. 207]; R. v. St. Mary, 13 East, 57; and as to costs, see now 11 & 12 Vict. c. 43, s. 18, [and 42 & 43 Vict. c. 49, s. 8,] and R. v. Barton, 13 Q. B. 389.
- 7. Lastly, the conviction should be subscribed, dated and sealed; see R. v. Elwell, Str. 794; Basten v. Carew, 3 B. & C. 649; and see 11 & 12 Vict. c. 43, s. 14, which requires the conviction or order to be drawn up under the hand and seal of the justice. The reason of dating it is, that it may appear when it was made; and if that do appear, that is enough, and an impossible date might be rejected, R. v. Picton, 2 East, 198; see R. v. Bellamy, 1 B. & C. 500.

The above observations apply to convictions in general; but a conviction is the creature of the statute law; and, if a statute prescribe any particular form for it, no matter what, that form [except when otherwise provided by statute] must be strictly pursued, *Davison* v. *Gill*, 1 East, 72; *Goss* v. *Jackson*, 3 Esp. 198.

By s. 27, sub-s. 5, of the Summary Convictions Act, 1879, it is provided that where an indictable offence is under the circumstances in that act mentioned, authorised to be dealt with summarily "The conviction shall contain a statement either as to the plea of guilty of an adult, or in the case of a child as to the consent or otherwise of his parent or guardian, and in the case of any other person of the consent of such person, to be tried by a court of summary jurisdiction."

[To proceed with the summary of the 11 & 12 Vict. c. 43.] The 18th sect. enables the justice to order costs either to the prosecutor or complainant, or

to the defendant, as to which see also the Summary Convictions Act, 1879, ss. 6, 8, & 28.

Sects. 19 to 29 & 31, relate to the mode in which penalties imposed, and costs ordered by justices are, under various circumstances, to be recovered and paid. Sects. 19 & 20 are partly repealed by the Summary Convictions Act, 1874, sched. See as to sect. 23 Leverick v. Mercer, 14 Q. B. 759; [as to sect. 25 R. v. Cuthush, L. R. 2 Q. B. 379; and as to sect. 26 Winn v. Mossmen. L. R. 4 Ex. 292; 38 L. J. Ex. 200. Further provisions on the like subject are contained in the Summary Jurisdiction Act, 1879, ss. 4 to 9, 21, 24, 28, 34, 35, 39, 43, and in the Summary Jurisdiction Act, 1884, s. 3]. And see as to the [proper] mode of [awarding] costs in cases of appeal under sect. 27 [of 11 & 12 Vict. c. 43], R. v. Hellier, 17 Q. B. 229; R. v. Binney, 1 E. & B. 810; and R. v. Huntley, 3 E. & B. 172; [R. v. Justices of Ely, 5 E. & B. 489; Gory v. Matthews, 4 B. & S. 425; 33 L. J. M. C. 14. As to sect. 31, see Mayor of Reigate v. Hort, L. R. 3 Q. B. 244; 37 L. J. M. C. 70

Sect. 32 enacts that the forms in the schedule shall be deemed good, valid, and sufficient in law, [but these forms have now been annulled, and others substituted, see *ante* p. 711.]

Sects. 33, 34, regulate jurisdictions of metropolitan police, and stipendary magistrates; also of the lord mayor and aldermen of London. [but these sects, do not apply to or restrict the operation of 42 & 43 Vict. c. 49, see s. 52.]

Sect, 35 provides that the act shall not extend to orders of removal, orders as to lunatics, [see, however, Bradford Union v. Clerk of the Peace for Wilts, L. R. 3 Q. B. 604; 37 L. J. M. C. 129], nor to informations concerning the excise, customs, stamps, taxes, or post office [but the foregoing exception in italics is repealed by 42 & 43 Vict. c. 49, s. 55], nor to orders, &c., in matters of bastardy, [but the Summary Jurisdiction Act, 1879, which is to be construed as one with 11 & 12 Vict. c. 43, does "apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, and to the proof of the service of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter, and to an appeal from an order in any matter of bastardy," | nor to proceedings under acts regulating the labour of children in factories, &c., [which last exception was repealed by the Factories and Workshops Act, 1871, 34 & 35 Vict. c. 104, s. 11: see now 41 Vict. c. 16, s. 89].

An adjudication by two justices under the Lands Clauses Consolidation and Railway Clauses Consolidation Acts. 1845, as to the compensation payable by a railway company to a person whose lands have been injuriously affected by their works, is [not] an order within sect. 1 of this act, [R. v. Edwards, 13 Q. B. D. 586; 53 L. J. M. C. 149; overruling Re Edmundson, 47 Q. B. 67.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), already referred to, the powers of courts of summary jurisdiction have been materially increased. It has not been thought necessary, however, to set out the details of that act, nor of the later act of 1884 (47 & 48 Vict. c. 43) which is principally a repealing and explanatory act.

The alterations in procedure, so far as they relate to the subject-matter of this act, have been already mentioned.

But the most important feature of the Act of 1879 is that it gives power to

courts of summary jurisdiction to deal summarily with certain specified indictable offences in three cases, viz.:—(1) In the case of a child (i.e., a person who, in the opinion of the court, is under 12 years), unless the parent or guardian objects, charged with any offence except homicide; (2) In the case of a young person (i.e., a person who, in the opinion of the court, is of the age of 12 and under 16 years of age), charged with certain cases of larceny, embezzlement, and receiving as specified in the First Schedule, if the accused consents; (3) In the case of an adult (i.e., a person who, in the opinion of the court, is of the age of 16 years or upwards), charged with the same class of offences, if he pleads guilty, or with another class of similar offences specified in the same Schedule, if he consents. See ss. 10–17, 24, 27, 28.

By s. 17 the right to claim trial by jury is given to a person charged before a court of summary jurisdiction, with an offence other than an assault involving a liability on conviction to imprisonment for a term of more than three months.

By s. 19, an appeal is given to the general or quarter sessions against certain summary convictions and orders. See as to procedure in appeal, ss. 31, 32.

By ss. 6, 7, 8, and 35, 37, special powers are given for the recovery as a civil debt of sums ordered to be paid by a court of summary jurisdiction. See R. v. Price, 5 Q. B. D. 300.

By s. 29 power is given to the Lord Chancellor to make, reseind, and alter rules in relation to the Summary Jurisdiction Acts. The present rules will be found in the Weekly Notes, Oct. 9, 1886.

If a conviction be void on the face of it, it follows, as of course, that [as a general rule] no act done in pursuance of it can be justified, and that any seizure of person or property under it will form the subject-matter of an action, as will be seen in the principal case; subject, however, to the provisions of 11 & 12 Vict. c. 44, ante, p. 704 et seq.

[Cases there are, however, in which the convicting justice, though he has convicted without jurisdiction and his order as been acted upon, is not liable to an action except he either acted malâ fide, or ought to have known of his defective jurisdiction. The class of cases referred to is where the jurisdiction of the justice depends upon the existence of a certain state of facts. Whether those facts exist is a collateral question which he has to decide; and though he decide wrongly and so by his wrong decision attribute to himself and act upon a jurisdiction which he does not possess, he is not liable to an action merely on account of his erroneous decision on the question of fact. Pease v. Chaytor, 3 B. & S. 620.

It is otherwise if the mistake be one of law. See *Houlden* v. *Smith*, 14 Q. B. 841, cited by Blackburn, J., in his judgment in *Pease* v. *Chaytor*, *uhi sup*. But until his erroneous judgment be acted upon so as to make him liable in trespass he is not liable for his judicial mistake. *Sommerville* v. *Mirehouse*, 1 B. & S. 652.]

But besides [the remedy by action,] there are two modes of impeaching [convictions], first by appeal, secondly by certiorari.

An appeal, like a conviction, is the creature of the statute law, and never lies unless where it is given by express terms, R. v. The Recorder of Ipswich, 8 Dowl. 103; R. v. Hanson, 4 B. &. A. 521; [R. v. Justices of Warwickshire, 6 E. &. B. 837; Exparte Chamberlain, 8 E. & B. 644. See also R. v. Justices of Worcester, 3 E. & B. 486; R. v. Inhabitants of London, 3 E. & B. 547; A.-G. v. Sillem, 10 H. of L. Ca. 704; 2 H. & C. 581; 33 L. J. Exch. 209].

The rule with regard to a certiorari is the very reverse. It always lies unless expressly taken away, R. v. Abhot, Dougl. 543; and it requires very strong words to do so; for even where a statute gave an appeal to the sessions, and directed that it should be finally determined there, and no other court should intermeddle with the causes of appeal, it was held that a certiorari lay after the appeal, R. v. Moreley, 1 W. Bl. 231; R. v. Jukes, 8 T. R. 542; see R. v. Justices of West Riding, Yorkshire, 1 A. & E. 575; where it was taken away, R. v. Fell, 1 B. & Ad. 380; R. v. Justices of Lancashire, 11 A. & E. 144, where an order in pursuance of a statute leaving the certiorari, but made by a town council empowered by 5 & 6 W. 4, c. 76, which takes it away. was held removable by certiorari. The reason of this is, that it is an extremely beneficial writ, being the medium through which the Court of Queen's Bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. [A section in an Act of Parliament taking away the certiorari does not apply where there has been an absence of jurisdiction, Expurte Bradlaugh, 3 Q. B. D. 509.

Where it is expressly taken away it has been decided that it cannot issue even to bring up to quash an order of justices in quarter sessions conditionally affirming a conviction subject to a case for the opinion of the court. Reg. v. Chantrell, L. R. 10 Q. B. 587, 44 L. J. Q. B. 167. Now, however, a certiorari is not in such case required, 42 & 43 Vict. c. 49, s. 40.]

Even where it is taken away in express terms, they do not include the crown unless named, R. v. Davies, 5 T. R. 626; R. v. Allen, 15 East, 333; R. v. Boultber, 4 A. & E. 498. Nay, it is said that the attorney-general, on behalf of the crown, might in such case obtain the writ for a defendant; see 1 East, 303, note, and the authorities there cited.

A certiorari is a writ, issuing out of the Chancery or Queen's Bench [Division of the High Court of Justice], commanding the judges or officers of an inferior court to certify and return the record of a matter before them. [See Walsall v. L. & N. W. R., 4 App. Cas., per Earl Cairns, C., at p. 39.] It is used for a great variety of purposes: but we are at present looking only at its applicability to the case of a conviction. No writ of error lies upon a conviction; so that a certiorari is the only mode of bringing it into the Queen's Bench [Division] in order to reverse it. [See per Bramwell, L. J., in Reg. v. Overseers of Walsall, 3 Q. B. D. 464. And the jurisdiction of the Court of Queen's Bench to issue the writ of certiorari formerly applied, and that of the Queen's Bench Division of the High Court of Justice now "applies only where there is some defect of jurisdiction or informality or defect apparent on the face of the proceedings" in the inferior Court, Reg. v. Overseers of Walsall (ubi sup.). The superior court cannot give itself jurisdiction through the writ of certiorari when it otherwise possesses none.]

It [has been held that a certiorari] is not, like a writ of error, granted exdebito justitie; but "application is made to the sound discretion of the court," R. v. Bass, 5 T. R. 252; R. v. Manchester and Leeds Rail. Co., 1 P. & D. 164; R. v. South Holland Drainage Committeemen, 1 P. & D. 79. [But in a recent case the Court of Queen's Bench, after taking time to consider this very point, held that where the applicant was "a party grieved" the writ ought to be treated like a writ of error, as ex debito justitie; but where the applicant is not grieved, but comes forward merely as one of the public, the court has a discretion. They held, however, that the writ is clearly not a matter of course. The court must be satisfied on affidavits that grounds for issuing it exist. And even where the applicant is a party grieved, if he has

by his conduct precluded himself from taking an objection, the court will not permit him to make it. Reg. v. Justices of Surrey, L. R. 5. Q. B. 466; 39 L. J. M. C. 145. See also Reg. v. Sheward, 9 Q. B. D. 741.

The application is by way of motion, and by 13 G. 2, c. 18, s. 5, "no certiorari shall be granted to remove any order, conviction, or other proceeding before a justice or at the sessions, unless it be applied for in six calendar months, and upon oath made that the party has given six days' notice in writing to the justice or justices, or two of them, if so many there be:" see R. v. Boughey, 4 T. R. 281; R. v. Bloxam, 1 A. & E. 386; R. v. Inhabitants of Sevenoaks, 7 Q. B. 136; [In re Hopkins, E. B. & E. 100; R. v. Allan, 4 B. & S. 915; 33 L. J. M. C. 98; R. v. Hodgson, 5 Nov. 1863, 9 Law T. 290]. The notice to the justices must be six days before the rule nisi is moved for, one day inclusive, the other exclusive, R. v. Goodenough, 2 A. & E. 463; R. v. Flounders, 4 B. & Ad. 865. It must be by or on behalf of the party intending to move, and must appear to be so, R. v. Justices of Lancashire, 4 B. & Ad. 289; R. v. Justices of Cambridgeshire, 3 B. & Ad. 887; R. v. Justices of Kent, 3 B. & Ad. 250; R. v. Justices of Lancashire, 3 P. & D. 86, 11 A. & E. 144, where the notice was held sufficient; R. v. Justices of Shrewsbury, [9 Dowl. P. C. 524; S. C. nom. R. v. How, 11 A. & E. 159. But the crown seems not to be bound by this even where it espouses the defendant's side, R. v. James, 1 East, 303, note; R. v. Berkeley, 1 Ken. 80; R. v. Battams, 1 East, 298,

If, upon the discussion of the rule, the writ be granted, it removes the conviction into the court above, where it is quashed if bad; if good, it remains in the Queen's Bench, unless, indeed, to keep it there would occasion a defect of justice, in which case it may be sent back again by writ of procedendo, R. v. Nevile, 2 B. & Ad. 299.

The person prosecuting the *certiorari* must by 5 G. 2, c. 19, enter into recognizance for 50l., with competent sureties to prosecute it with effect and pay costs if unsuccessful. This act does not, however, apply to the case of a prosecutor obtaining the writ, R. v. Spencer, 9 A. & E. 485. [A writ of certiorari may on motion be superseded quia improvide emanavit, Reg. v. Chantrell, L. R. 10 Q. B. 587, 44 L. J. Q. B. 167.

Where certiorari has gone to bring up a conviction for an offence under the criminal law, no appeal will lie to the Court of Appeal, criminal cases being expressly excepted from the jurisdiction of that court by s. 47 of the Judicature Act, 1873, see Reg. v. Fletcher, 2 Q. B. D. 43, 46 L. J. M. C. 4; Reg. v. Rudge, 16 Q. B. D. 459. But where by certiorari an order of quarter sessions as to a borough rate had been brought into the Queen's Bench Division, and a rule nisi to quash such order was subsequently discharged, and the order of sessions was affirmed by a rule of the Queen's Bench Division, the Court of Appeal were equally divided as to whether an appeal lay from this last rule. Bramwell and Cotton, L. JJ., held that the jurisdiction was given by the general words of the 19th section of the Judicature Act, 1873; whilst Cockburn, C. J., and Brett, L. J., were of the contrary opinion, being of opinion that the Court of Queen's Bench never had jurisdiction to quash such an order of sessions, but merely that a custom had arisen of taking the opinion of the Queen's Bench, upon which the sessions acted, and that therefore there had been no decision of the Queen's Bench Division on which an appeal would lie. On appeal, the House of Lords adopted the view of Bramwell and Cotton, L. JJ., Walsall v. L. & N. W. R. Co., 4 App. Cas. 30; 48 L. J. Q. B. 65. No leave to appeal under sect. 45 of the act is in such case necessary, Illingworth v. Bulmer East Highway Board, 53 L. J. M. C. 60; and see Reg. v. Pemberton, 5 Q. B. D. 95.]

The Queen's Bench [Division], exercising its appellate power over a conviction removed into it by certiorari, will not allow the merits of the case to be again litigated upon affidavit; for the justices are the proper persons to determine upon those. R. v. Bolton, 1 Q. B. 66; R. v. Justices of Buckinghamshire, 3 Q. B. 800: [And so where the justices in quarter sessions quashed a magistrate's conviction on the ground that certain words of the statute on which it was founded were omitted in it, the Queen's Bench Division, though holding their decision to be erroneous, declined to interfere by mandamus, Reg. v. Justices of Middlesex, 2 Q. B. D. 516, 46 L. J. Q. B. 746. Where, however, by consent of the parties, the quarter sessions of a recorder had stated a special case, the court would decide on certiorari whether the facts stated in the case amount to the offence charged, even though the certiorari were taken away. R. v. Dickenson, 7 E. & B. 831; though see Reg. v. Chantrell, L. R. 10 Q. B. 587, 44 L. J. Q. B. 167. And now, by s. 40 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), it is provided that "a writ of certiorari or other writ shall not be required for the removal of any conviction, order, or other determination, in relation to which a special case is stated by a court of general or quarter sessions for obtaining the judgment or determination of a superior court."]

But a question has occasionally arisen whether, in cases where the justices have proceeded without jurisdiction, and have nevertheless stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit. It certainly appears desirable that the court should have the power to entertain the question of jurisdiction. Some cases might easily be suggested, in which not only great private but great public inconvenience might arise from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted to them by law.

Whether a mandamus would lie in such a case to oblige them to make a correct statement, is a question which the Queen's Bench [Division] would, at least in the majority of instances, probably answer in the negative; for though it is true that in some cases, where there has been a clear omission of some material ingredient in a conviction, the court has by mandamus ordered it to be supplied; as in De Rix, 4 D. & R. 352; R v. Marsh, 4 D. & R 260; R. v. Warneford, 5 D. & R. 489; R. v. Allen, 5 D. & R. 490; yet this has been done after the order or conviction had been returned upon a certiorari; and it either clearly appeared, or was shown by affidavit, to the court, that the whole or some material portions of the evidence had been omitted; (see the observations of the court on these cases in R. v. Wilson, 1 A. & E. 627;) and the mandamus went not to compel the court below to insert a particular thing, or raise a particular question, upon their return, but merely to oblige them to set out an integral part of the case, which must have existed, and had been omitted. I say must have existed, because in R. v. Wilson, where evidence might or might not have been acted on, the court would not send the mandamus.

And there are cases in which the court has refused to interfere by mandamus to compel the courts below to raise a particular question; for instance, R. v. Hewes, 3 A. & E. 725, the jury had returned a verdict, guilty by mischance; the chairman of the sessions told them they must find a general verdict; and they found a verdict of guilty, and recommended to mercy on the ground that

the act was not done with a malicious intent. The motion was for a mandamus to set the clerk of the peace's minute right according to the facts, in order that a writ of error might be sued out. The rule was discharged. Mr. Justice Patteson said, "The case of a mandamus to enter continuances and hear is not like this. There the justices are ordered merely to hear an appeal, and to enter continuances because those are necessary in order to enable them to hear; so, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a mandamus, as in R. v. Justices of Middlesex, 5 B. & Ad. 1113. I have always understood that this court might send a mandamus to an inferior court to do its duty in general terms, but not to do a particular thing, as to make an alteration here or there in the clerk of the peace's minutes;" see R. v. Justices of Middlesex, 9 A. & E. 546, judgment of Littledale and Coleridge, JJ., and per curiam in R. v. Lords of the Treasury, 10 A. & E. 179; R. v. Lords of the Treasury, 10 A. & E. 374, and per Lord Denham in R. v. Eastern Counties Railway, 10 A. & E. 547; R. v. Justices of Buckinghamshire, 3 Q. B. 800; [R. v. Justices of Bristol, 18 Jur. 426, note a; R. v. Dayman, 7 E. & B. 672].

Supposing that the court below cannot be compelled by mandamus to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be taid before it by way of affidavit, on the record being brought before it by a writ of certiorari?

In R. v. St. James's, Westminster, 2 A. & E. 241, it was remarked by Mr. Justice Taunton (a judge whose obiter dicta are always worthy of the greatest attention) that this has been constantly done. In R. v. Inhabitants of Great Marlow, 2 East, 244, an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction, and was finally quashed. The court in that case had taken time to consider as to the practice with regard to receiving the affidavit; and Mr. Justice Lawrence mentioned several similar cases in which that course had been pur-A similar course seems to have been pursued with an order of the quarter sessions in R. v. Justices of the West Riding of Yorkshire, 5 T. R. 629. In the case of R. v. Justices of Cheshire, 1 P. & D. 93, 8 A. & E. 400, the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. "It cannot be disputed," said Mr. Justice Coleridge in that case, "that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made, which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court." Accord. R. v. Sheffield and Manchester Rail. Co. [11 A. & E. 194]; and it seems to be settled by the later cases that a defect of jurisdiction may be shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it. [See the judgments in] R. v. Bolton, 1 Q. B. 66; [The Whitbury, &c., Union Case, 4 E. & B. 314; In re Penny, 7 E. & B. 660, where on certiorari an inquisition under the Lands Clauses Act, 1845, was quashed upon affidavits showing that the jury in assessing the damages took into account an item which was not a subject for compensation within the act (Mortimer v. S. Wales Rail. Co., E. & E. 375); In re Hopkins, E. B. & E. 100; R. v. The Recorder of Cambridge, 8 E. & B. 637; R. v. Metropolitan Rail. Co., 32 L. J. Q. B. 367; Read v. Victoria Station and Pimlico Rail. Co., 32 L. J. Exch. 167]; and R. v. Cheltenham Paving Commissioners, 1 Q. B. 467, where the defect consisted in the presence on the bench of interested parties as justices.

On the other hand, nothing can be more common than to find it laid down that a conviction or order is conclusive of the matter stated in it for the purpose of showing a jurisdiction. [See the judgment of Mr. Justice Patteson In re Crarke, 2 Q. B. 634; see also Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417; 43 L. J. P. C. 39.

Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted to constitute a legal court, and who have stated facts which, on information being laid, or a case coming before them, would be matter to be proved, and adjudicated upon by them, and cases in which the objection is, that they are not a court at all, because not in fact magistrates, or because interested, because they sat out of the limit of their jurisdiction, or for some other reason, striking at their existence as a court, so that the objection is not that the statement of a court is erroneous, but that the source of the statement is not a court at all. See the judgment of Bramwell, B., In re Baker, 2 H. & N. 219. But it may well be doubted whether this distinction affords a sufficient test.

It should seem that the Queen's Bench Division will on certiorari entertain affidavits where the conviction is good on the face of it, — not only to show that preliminary matters required to give the justice jurisdiction to enter upon an inquiry into the merits of the case, were wanting, see R. v. Bolton, 1 Q. B. 66; R. v. Badger, 6 E. & B. 13; R. v. Wood, 5 E. & B. 49; R. v. Justices of Totness, 2 L. M. & P. 230; the judgments in R. v. St. Olave's District Board, 8 E. & B. 529; and In re Smith, 3 H. & N. 227 — or that circumstances appeared in the course of the inquiry which ousted his jurisdiction, R. v. Nunnetey, E. B. & E. 852; R. v. Cridland, 7 E. & B. 352; R. v. Backhouse, 30 L. J. M. C. 118; R. v. Stimpson, 4 B. & S. 301 — but also that there was no evidence to prove some fact, the existence of which was essential to establish the offence charged.

It must be remembered that before 11 & 12 Vict. c. 43, the evidence must have been set forth in the conviction, and if there was none to support some material part of the information, the conviction would have been quashed, R. v. Smith, 8 T. R. 588. The alteration by the statute of the forms of conviction, which dispenses with the necessity of setting forth the evidence, plainly does not narrow the jurisdiction of the Court of Queen's Bench to quash writs void for matter of substance; and in order to exercise this jurisdiction in respect of convictions bad for want of evidence, but drawn up according to the general form given by the statute, it is necessary that the court should receive affidavits. See the judgments in Briley's Case, 3 E. & B. 607, where affidavits were admitted for the purpose of impeaching a conviction under the Masters' and Servants' Act, 4 Geo. 4, c. 34, by showing that there was no evidence before the justices from which the relation of master and servant could be inferred.

"Affidavits," said Pollock, C. B., In re Baker, 2 H. & N. 219, 223, "may be used for the purpose of showing that there was no evidence at all, but if there is conflicting evidence, it is for the justice to decide upon it." (But see Stanhope v. Thorsby, L. R. 1 C. P. 423, 35 L. J. M. C. 182.)

In In re Thompson, 6 H. & N. 193, 30 L. J. M. C. 19 S. C., where the prisoner had been charged with unlawfully assaulting and abusing Susannah H., and it was plain upon the evidence that if any offence, a rape or assault with intent to ravish had been committed, yet the justices convicted the prisoner

of a common assault, it appears to have been the opinion of Pollock, C. B., and Wilde, B., that the conviction was bad, because the justices could not have believed that only a common assault had been committed. But the court was divided, and *Williamson v. Dutton*, 3 B. & S. 821, may be considered a decision contrary to that opinion.

As a general rule the jurisdiction of justices to convict summarily ceases as soon as a claim of title in himself, Cornwell v. Sanders, 3 B. & S. 206 (though only colourable, provided the right claimed be one known to the law), is bona fide made by the party against whom the proceeding is instituted, R. v. Cridland, 7 E. & B. 853; Hudson v. McRae, 4 B. & S. 585; where the claim was made bona fide, but to a right impossible in law, and a conviction was upheld, followed in Foulger v. Steadman, L. R. 8 Q. B. 65, (disapproving of Jones v. Taylor, 1 E. & E. 20), and also in Hargreages v. Diddams, L. R. 10 Q. B. 582. See also Leatt v. Vine, 30 L. J. M. C. 207; Cornwell v. Sanders, 3 B. & S. 206, and Watkins v. Major, L. R. 10 C. P. 662, where a distinction is drawn between conviction under the statutes for the protection of game and the ordinary case of a conviction for which it is said to be necessary to prove a mens rea. The question whether there be such a bonât fide claim of right is a collateral question for the justices to decide, but the superior court on affidavit will review their decision. See R. v. Stimpson, 4 B. & S. 301, where it was held that there was not, Paley v. Birch, 16 L. T. N. S. 410, where it was held that there was, evidence to justify the inferior court in finding that the claim was not bona fide set up. See also Williams v. Adams, 2 B. & S. 312; Legge v. Pardoe, 30 L. J. M. C. 108; Reg. v. Sandford, 30 L. T. N. S. 601; Lovesy v. Stallard, Id. 792.

This rule as to the cesser of the jurisdiction to convict summarily on a bonâ fide claim of right being set up is founded not on statute but on general principles of law. See per Blackburn, J., in Cornwell v. Sanders, ubi sup., per Crompton, J., in Reg. v. Stimpson, ubi sup.

There are other similar cases in which restrictions are placed on the justices' jurisdiction by statute.

In R. v. Nunneley, E. B. & E. 852, an order, made by justices for payment of a church-rate, under 53 Geo. 3, c. 127, which provides that if the validity of the rate be disputed, and the party disputing give notice to the justices, they are to forbear giving judgment thereon, was quashed on affidavits showing that a reasonable objection had been made to the validity of the rate, notwithstanding which the justices proceeded with the case, holding, groundlessly, that the objection was not made bona fide. Erle, J., said: "Without coming to the much disputed point whether a fact which is in doubt is one which affects the jurisdiction in the first instance, or one upon which magistrates are to judge, I think this case is clear enough. The jurisdiction of the justices is to decide whether the rate is made and demanded. But then there is a collateral point on which the jurisdiction depends, that is, whether the validity of the rate is disputed. If it is, the justices are to hold their hands. That is collateral to the merits; and a matter on which the jurisdiction depends. And as laid down in the judgment of Bunbury v. Fuller, 9 Exch. 140, 'it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends.' Then to take the simplest case: Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a

collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either foreborne or proceeded on the main question in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake." See further Ex parte Mannering, 31 L. J. M. C. 153.

Where a statute, 24 & 25 Vict. c. 97, s. 52, enacted that nothing therein contained should extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of " and the justices found that the appellant did not act under a fair and reasonable supposition and convicted him, the court upheld the conviction, holding that the above express provision overrode the proviso usually implied as to summary convictions, that a bonâ jide claim of right is sufficient to oust the jurisdiction of the justices." White v. Feast, L. R. 7 Q. B. 353. See this case, distinguished in Denny v. Threaites, 2 Ex. D. 21, 46 L. J. Ex. 588, 46 L. J. M. C. 141.

By 24 & 25 Vict. c. 100, s. 46, it is provided that justices "shall not hear and determine any case of assault in which any question shall arise as to the title to land." Under this section it was held that justices are prohibited where title is claimed from going into the question of excess of violence and convicting summarily upon that. Reg. v. Pearson, L. R. 5 Q. B. 237, 39 L. J. M. C. 76.]

Assuming that a defect of jurisdiction may in these cases be shown by affidavit, every case, or almost every case of a defect of jurisdiction in the convicting magistrate or magistrates would be reviewable by certiorari; for though it is now usual for the statute creating the offence to contain a clause taking away the certiorari, yet such clauses do not, generally speaking, apply to cases where there was no jurisdiction to convict, such cases not falling within the act of parliament at all, R. v. Justices of Somersetshire, 5 B. & C. 816; R. v. Justices of the West Riding of Yorkshire, 5 T. R. 629; R. v. Inhabitants of Great Marlow, 2 East, 244; [R. v. Wood, 5 E. & B. 49; S. C. nom. R. v. Rose, 24 L. J. M. C. 130; Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, 43 L. J. P. C. 39; Ex parte Bradlaugh, 3 Q. B. D. 509]; nor do they apply to cases where the conviction has been obtained by fraud, as when a maltster had by collusion, and for the purpose of exonerating himself from penalties, under 7 & 8 Geo. 4, c. 53, procured the conviction of his servant, R. v. Gillyard, 12 Q. B. 527; [Colonial Bank of Australasia v. Willan, ubi sup.].

But there is a distinction between cases of a want of jurisdiction and an irregularity in exercising it: in the former case the certiorari lies notwith-standing the private clause, in the latter it is taken away. R. v. Bristol and Exeter Rail. Co., 1 P. & D. 170, note, 11 A. & E. 202; R. v. Sheffield and Manchester Rail. Co., 11 A. & E. 194; [R. v. Justices of Warwickshire, 6 E. & B. 837; Lalor v. Bland, 8 Irish C. L. R. 115]. In the [first of these] cases, indeed, the court went to an extent which seemed likely very much to confine the applicability of the writ of certiorari; they threw out the opinion that in cases where the proceeding was merely irregular, the clause taking away the certiorari applied, and that where it was void there was no occasion for it, and that the court would not grant it. However, in the [second] case, they appear disposed to repudiate the application of this dilemma: at all events, in cases in which the proceeding sought to be removed is not void on the face

of it, but is impugned by affidavit. And in R, v. Cheltenham Paving Commissioners, 1 Q. B. 467, it was distinctly held that in a case of malversation such a clause would not operate.

Though it has been endeavoured to show that the Queen's Bench has a right in case of defect of jurisdiction to entertain the objection founded upon such defect on affidavit, yet it must be observed that the court is not bound to do so upon certiorari; for [except where the application is by the party grieved, Reg. v. Justices of Surrey, L. R. 5 Q. B. 466, 39 L. J. M. C. 145,] a certiorari, as has already been pointed out, is a writ not of right, but in the discretion of the court to grant or to refuse (but see the judgment in Symonds v. Dimsdale, 2 Exch. 533). And cases may occur in which, though there may have been a defect of jurisdiction, still the court may conceive that the interests of justice would be rather impeded than advanced by any summary interference on their part.

In R. v. Justices of Cambridgeshire, 4 B. & Ad. 122, Mr. Justice Patteson said, "With regard to the objections in point of jurisdiction, I protest against its being understood that we can on every occasion look into extrinsic matter on motions to bring up orders by certiorari." "We must be cautious," said Mr. Justice Coleridge, "not to exceed our jurisdiction; and when we find there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order."

I do not understand these observations of the learned judges as importing that there are cases of a total defect of jurisdiction which the Court of Queen's Bench has no power to entertain on affidavit, but that the leaning of the court is against doing so, except where public justice would be thereby furthered. See R. v. Justices of Denbighshire, 1 B. & Ad. 616. See R. v. South Holland Drainage Committeemen, 1 P. & D. 79; R. v. Manchester and Leeds Rail. Co., 1 P. & D. 164. And that its disinclination to interfere is strong and uniform in cases where the legislature has provided another competent tribunal of appeal to which the question might be carried. See R. v. Justices of Middlesex, 9 A. & E. 548, last point.

In Exparte Lord Giford, Carrow's New Sess. Cas. 490, Mr. Justice Williams refused a certiorari on the ground that if the recognisance sought to be removed were void, the applicant might treat it accordingly. It has not, however, been usual to refuse the writ for this reason, which since the 11 & 12 Vict. c. 44, s. 2, prohibiting actions against justices, &c., for anything done under convictions or orders made without jurisdiction until they have been quashed, would scarcely be given in answer to an application to bring up a conviction or order to have them quashed for a defect of jurisdiction.

In R. v. Justices of Cambridgeshire, 3 B. & A. 187, Lord Denman, in his judgment, suggested another ground on which an application upon affidavit might possibly be entertained. "I do not say," said his lordship, "that even on certiorari the court would not set aside an order if manifest fraud were shown. That may be so. In R. v. Justices of Somersetshire, 5 B. & C. 816, where a certiorari was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the court refused a rule, saying that the parties complaining might appeal to the sessions, or move for a criminal information. Notwithstanding that refusal, however, I do not say that if corruption were clearly made out, the court would not, upon an application like this, declare the order invalidated by the fraud." This observation of his lordship is consistent with the principle laid down by

De Grey, C. J., in the Duchess of Kingston's Case, post, volume 2, where his lordship observed that "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal." [See Shedden v. Patrok, 1 Macq. H. of Lords C. 535; and the nullity of the judgment or decree obtained by it, though the judgment or decree has not been set aside or reversed, may be alleged in a collateral proceeding, see the opinion of Willes, J., in R. v. Saddler's Co., 3 El. & El. 42, 10 H. of L. Cas. 404, 32 L. J. Q. B. 347]. And see R. v. Gillyard, [12 Q. B. 527.] where fraud being shown, a conviction obtained by means thereof was brought up by certiovari and quashed. [and Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, 43 L. J. P. C. 39].

However, where the justice or justices had jurisdiction, the court will not grant a certiorari to remove the conviction or order upon a suggestion made by affidavit that they have exercised the jurisdiction wrongly: R. v. Justices of Cheshire, 1 P. & D. 88, 8 A. & E. 398; R. v. St. James's, Westminster, 2 A. & E. 241; for that would be to substitute the court above for the tribunal to which the statute has committed the inquiry.

[So, in effect, justices were often obliged to determine finally difficult points of law on questions of great general importance, without having sufficient materials, or time, for the purpose, and they could not obtain for their guidance any assistance by way of opinion, or decision, from the superior courts, see R. v. Daymen, 7 E. & B. 672; R. v. Paynter, Poid. 328. This defect in the law has been remedied by the Justices' Special Case Act, 20 & 21 Vict. c. 43, by which magistrates are enabled, and may be compelled, to state cases for the opinion of any of the superior courts, and also by the Summary Jurisdiction Act, 1879, sect. 33, which gives a further power of stating a case for the opinion of the High Court of Justice.

The 2nd section of 20 & 21 Vict. c. 43 provides that after the hearing (Bradshaw v. Vaughton, 30 L. J. C. P. 93) and determination (Davys v. Douglas, 4 H. & N. 183; S. C. 28 L. J. M. C. 193) by a justice or justices of any information or complaint which they have power to determine summarily (Townsend v. Reed, 10 C. B. N. S. 308; Ex parte May, 2 B. & S. 426, 31 L. J. M. C. 161; Luton Local Board of Health v. Davis, 29 L. J. M. C. 173; Diss Urban Sanitary Authority v. Aldrich, 2 Q. B. D. 179, 46 L. J. M. C. 183; Sandgate Local Board v. Plodge, 14 Q. B. D. 730; either party to the proceeding may, if dissatisfied with the determination (Davys v. Douglas), as erroneous in point of law (Newman, app., Baker, resp., 8 C. B. N. S. 200; Taylor v. Smart, 31 L. J. M. C. 252; Hargreaves v. Taylor, 33 L. J. M. C. 111; Hobbs v. Dance, L. R. 9 C. P. 30), apply in writing within three days (Mayer v. Harding, L. R. 2 Q. B. 410), to the justice or justices, to state and sign a case, setting forth the facts, and the grounds of the determination, for the opinion of any one of the superior courts of law.

Within three days after receiving the case the appellant is to transmit it (Banks v. Goodwin, 3 B. & S. 548, 32 L. J. Q. B. 87; Pennell v. Uxbridge, 31 L. J. M. C. 92; Local Board, &c., of Gloucester v. Gardner, 32 L. J. M. C. 66) to the court named in his application, first giving (Ashdown v. Curtis, 31 L. J. M. C. 216) written notice of the appeal (Crick v. Ockmand, Q. B. 17 Jan. 1863), with a copy of the case so written and signed, to the other party.

(As to these conditions to the right of appeal, see *Peacock v. The Queen*, 4 C. B. N. S. 264; *Morgan v. Edwards*, 5 H. & N. 415; *Syred v. Carruthers*, E. B. & E. 469; *Woodhouse v. Wood*, 29 L. J. M. C. 149; *G. N. R. v. Inett*, 2 Q. B. D. 284, 46 L. J. M. C. 237, 46 L. J. Q. B. 749.)

By sect. 3 the appellant on applying for the case (Chapman v. Robinson, E. & E. 25; Stanhope v. Thorsby, L. R. 1 C. P. 423, 35 L. J. M. C. 182) must enter into a recognizance (Stanhope Thorsby, ubi. sup.) and pay certain fees, and then upon a condition being added to the recognizance for his appearance before the justices to abide by their judgment if unreversed, he will, if in custody, be entitled to his liberty.

By sect. 4 the justices, if of opinion that the application is merely frivolous (and provided it was not directed by the attorney-general), may refuse to state the case; but then by sect. 5, the Court of Queen's Bench (now represented by the Queen's Bench Division of the High Court of Justice, under sect. 34 of the Judicature Act, 1873), may grant a rule calling upon them and the respondent to show cause why they should not do so, and may make the rule absolute, or discharge it with or without costs.

By sect. 6 the court to which the case is transmitted may hear and determine the questions of law arising upon it (Governors, &c., of St. James's, Westminster v. Battersea, Overseers of, C. P. 6 Jur. N. S. 100; Jones v. Taylor, 1 E. & E. 20, even on points not taken before the justices, Knight v. Halliwell, L. R. 9 Q. B. 412), and reverse, affirm, or amend the determination, or remit the matter to the justices with the opinion of the court, or may make such other order in relation to the matter (Shackell West, 29 L. J. M. C. 45), and such orders as to costs (Budenberg v. Roberts, L. R. 2 C. P. 292; Garnett v. Backhouse, L. R. 3 Q. B. 699), as to the court shall seem fit; and all such orders are final and conclusive on all parties. The same section provides that the justices are not to be liable for any costs of the appeal. (As to the costs of the appeal, see Venables v. Hardman, E. B. & E. 79.) Costs are granted even though the case be struck out on account of the failure of the appellant to transmit the case within three days, G. N. R. v. Inett, 2 Q. B. D. 284, 46 L. J. M. C. 237, disapproving Peacock v. The Queen, 4 C. B. N. S. 264; and see Crowther v. Boult, 13 Q. B. D. 680.

By sect. 7 the case may be remitted to the justices for amendment, *Christie* v. *Guardians of St. Luke's*, 8 E. & B. 992; *Yorkshire Tire and Axle Co.* v. *Rotherham*, &c., 4 C. B. N. S. 362; *Rider* v. *Wood*, 29 L. J. M. C. 1.

By sect. 8 the powers given to the superior court may be exercised by a judge of the court sitting in chambers in term time or in vacation. Sect. 9 authorises the justices to enforce any conviction or order affirmed, amended, or made by the superior court, and exempts them from liability by reason of any defect in such conviction or order; see Waller v. G. W. Rail. Co., 29 L. J. M. C. 107. By sect. 10 no certiorari or other writ is required for the removal of the conviction, order or determination, in reference to which the case is stated. Sect. 11 enables the superior courts to make rules for the practice and proceedings under the act. Sect. 13 relates to recognizances taken under the act, and sect. 14 deprives parties who appeal under the act, of their appeal to quarter sessions.

The Court of Common Pleas have held that the act does not apply to a decision of justices called in to decide a dispute under the Friendly Societies Acts, it having been enacted by 18 & 19 Vict. c. 63, s. 40, that such a decision shall be binding and conclusive on all parties. See Callaghan v. Dolwin, L. R. 4 C. P. 288, 38 L. J. M. C. 110, overruling Reg. v. Lambarde, L. R. 1 Q. B. 388.

The fact of another appeal being given by statute does not exclude this act, Power v. Wigmore, L. R. 7 C. P. 386.

By the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 33, it is further provided that "(1) Any person aggrieved who desires to question a

conviction, order, determination, or other proceeding. Sindpute Local Board v. Pledge, 14 Q. B. D. 730 of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of the jurisdiction, may apply to the court (Exputte Cartis, 3 Q. B. D. 13 to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated. (2) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of 'The Supreme Court of Judicature Act, 1875,' and the acts amending the same; and subject as aforesaid, the act of "20 & 21 Vict. c. 43, above stated, "shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that act.

· Provided that nothing in this section small prejudice the statement of any special case under that act."

By Rule 18 of the Summary Jurisdiction Rules, 1886, made in pursuance of the above section, "An application to a court of summary jurisdiction" under that section " to state a special case shall be made in writing, and a copy left with the clerk of the Court, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognizance shall have been entered into." (See the rules set out in extense in the Weekly Notes, October 9th. 1886.)

JURISDICTION AND ATTACKING JUDGMENTS COLLATERALLY.

Wither the judgments of any court, whether of superior or of inferior jurisdiction, may, under certain circumstances, be attacked collaterally, for want of jurisdiction on the part of the court rendering the judgment, nevertheless the judgments of superior courts stand upon a very different footing from the judgments of inferior courts in this regard.

Although the judgments of courts, whether of superior or inferior jurisdiction, import, for most purposes, absolute verity, and are conclusive between the parties as to the points adjudicated, this is true subject to the condition that the court assuming to act had jurisdiction not only of the subject-matter of the controversy, but also of the persons of the parties.

I.

The Distinction between Courts of Superior and those of Inferior Jurisdiction.

It is not easy to state any general rule by which courts of inferior may be distinguished from those of superior jurisdic-

tion. The distinction is often stated to be that between courts of record and those not of record; and the rules conform substantially to this view. But the terms "inferior" and "superior" are more commonly used in the cases.

The terms "limited" and "general" are often used to distinguish the kind of jurisdiction of certain courts. Indeed, the terms are not infrequently used interchangeably with the terms "inferior" and "superior." In this use the terms are by no means accurately applied; e.g., as we shall see, the United States Circuit and District Courts are of limited though of superior jurisdiction. The terms are also productive of confusion in this, that even superior courts of a general jurisdiction are, when exercising their powers for some special and limited statutory purpose, in the same, or nearly the same, position as to supporting presumptions, &c., as inferior courts. It will not be attempted to formulate in this note a general rule, or to go into any full discussion regarding the distinctions. The distinction which is perhaps the most obvious of all is that between courts which are of record and those which are not. Cf. Turner v. Malone, 24 S. C. 398; Epping v. Robinson, 21 Fla. 36, and many cases. This, however, fails to meet all the cases. In Texas the distinction has been drawn as between courts the powers of which are established by the Constitution of the State, and those which owe their existence to special acts; Williams v. Ball, 52 Tex. 603; Holmes v. Buckner, 67 Tex. 107; these courts are also courts of record.

The following rule of distinction is stated in Freeman on Judgments (3d ed.), section 122: "The next matter to be ascertained is whether the judgment was rendered by a court of general or of special jurisdiction. There is no well-defined test by which to determine in all cases whether a court belongs to the one class or to the other. But all courts invested with a general common-law jurisdiction, in law or in equity, are, when exercising such jurisdiction, properly included in the first class; while all such courts as are erected upon such principles that their judgments must be disregarded until proceedings conferring jurisdiction are shown, belong to the second class. . . . The use of the words 'superior' and 'inferior,' or 'limited' and 'general,' however apt they may have once been, are less so at this time and place; and their duties, in view of our system and mode of procedure, would be better performed by

the terms 'courts of record,' and 'courts and tribunals not of record.'"

We have retained the terms "superior" and "inferior," simply because the terms seem to be of most common use in the books and cases. Avoiding discussion of the theoretical distinctions, the following decisions have been reached:—

Beside state supreme courts and other courts of a similar character, when they act under general powers, the following have been declared to be superior courts:—

United States circuit and district courts. - It is now well settled that these courts, though of limited, are also of superior jurisdiction. See language in Turner v. Bank of North America, 4 Dall. 8; Mason v. Tuttle, 75 Va. 105 (Limited Act). See Pearce v. Winter Iron Works, 32 Ala. 68; Chemung Canal Bank v. Judson, 4 Seld. 254; Kempes Lessee v. Kennedy, 5 Cr. 185; Baldwin v. Hale, 17 Johns. 272; Wood v. Mann, 1 Sumn. 580; Griswold v. Sedgwick, 1 Wend. 131; Skillerns Ex'rs v. Mays Ex'rs, 6 Cr. 267; Ex parte Watkins, 3 Pet. 193; Kennedy v. Georgia Bank, 10 How. U. S. 586; McCormick v. Sullivant, 10 Wheat. 192; Wright v. Marsh, 2 Greene (Ia.) 94; Turrell v. Warren, 25 Minn. 9; Williamson's Case, 26 Pa. St. 9. But see Boisse v. Dickson, 31 La. Ann. 741; Morse v. Presbey, 25 N. H. 299. These latter cases mainly depend upon the fact that the court rendering the judgment was acting under special and limited acts, as, for instance, the bankrupt laws.

County courts.—As a rule, it is held that the county courts in the various states, where they are courts of record, are courts of general jurisdiction: Propst v. Meadows, 13 Ill. 157. The English county courts established, and their powers defined by special act of Parliament, are within the same rule; Levy v. Moylan, 10 C. B. 189; Houlden v. Smith, 19 L. J. N. S. Q. B. 170. County courts in Florida are courts of record; Epping v. Robinson, 21 Fla. 36. County courts of common pleas in Tennessee are courts of general jurisdiction and are courts of record; Pope v. Harrison, 16 Lea (Tenn.) 82. See, also, Bannard v. Bannard, 119 Ill. 92; Lessee of Grignon v. Astor, 2 How. 319.

The following courts have been generally held to be, in the particular states where they are held, of inferior jurisdiction:—

Courts of justices of the peace. — See for dieta and decisions: Mudge v. Yaples, 58 Mich. 307; White v. Morse, 139 Mass. 162; People v. Jarrett, 7 Ill. App. 566; Knell v. Briscoe, 49 Md. 414; Londegan v. Hammer, 30 Ia. 508 at p. 512; Morton v. Crane, 39 Mich. 526. See Tyler v. Alford, 38 Me. 530; Tompkins v. Sands, 8 Wend. 462; Armstrong v. Campbell, 1 Brev. Pt. II. p. 259; McClure v. Hill, 36 Ark. 268; Wise v. Withers, 3 Cr. 331; Clark v. Holmes, 1 Doug. (Mich.) 390; Piper v. Pearson, 2 Gray 120; Clark v. May, 2 Gray 410; Sullivan v. Jones, 2 Grav 570; Bigelow v. Stearns, 19 Johns. 39; Estopinal v. Peyroux, 37 La. Ann. 477; Wright v. Rouss, 18 Neb. 234; Little v. Moore, 1 South. 74; Cunningham v. Pacific Ry., 61 Mo. 33; Evans v. Pierce, 2 Scamm. 468; Pardon v. Divine, 23 Ill. 572; Anderson v. Miller, 4 Blackf. 417: Wood v. Wood, 78 Ky. 624; Clark v. Holmes, 1 Doug. 390; Camp v. Wood, 10 Watts 118; Bersh v. Schneider, 27 Mo. 101; Thomas v. Robinson, 3 Wend. 267. It was held in Hofheimer v. Losen, 24 Mo. App. 652, that where a judgment of a justice of the peace of Illinois was offered in a Missouri court, the law giving the justice jurisdiction must be proved.

The contrary view has been taken, however, in some states, as a rule, owing to the fact that the courts were of record. In some of the cases the courts are not of record, but their judgments are viewed with the same supporting presumptions; Billings v. Russell, 23 Pa. St. 189; Clark v. M'Comman, 7 W. & S. 469; Fox v. Hoyt, 12 Conn. p. 497; Wright v. Hazen, 24 Vt. 143; Turner v. Ireland, 11 Humph. 447; Stevens v. Mangum, 27 Miss. 481; Williams v. Ball, 52 Tex. 693; Holmes v. Buckner, 67 Tex. 107; Haylett v. Ford, 10 Watts 101.

Probate courts, surrogates' courts, and orphans' courts. — These courts are commonly regarded as of inferior, or, at least, limited jurisdiction. Cf. Forbes v. Battle, 13 S. & M. 133; Smith v. Rice, 11 Mass. 506; Rea v. M'Eachron, 13 Wend. 466; Atkins v. Kinnan, 20 Wend. 241; McKee v. McKee, 14 Pa. St. 231; M'Pherson v. Cunliff, 11 S. & R. 422; Brodess v. Thompson, 2 Harr. & Gill 120; People v. Corlies, 1 Sandf. 288; Jenks v. Howland, 3 Gray 536; Flinn v. Chase, 4 Den. 85; Culver's Appeal, 48 Conn. 165. But see, semble contra Inco v. Commercial Bank, 70 Cal. 339; Key v. Vaughan, 15 Ala. 497. Consult Canfield v. Sullivan, 85 N. Y. 153. But see Hess v. Cole,

3 Zab. (Law) 116; Matter of Flatbush Avenue, 1 Barb. 286; Anderson v. Miller, 7 Black. 417; Corliss v. Corliss, 8 Verm. 373 at p. 389; Enos v. Smith, 7 S. & M. 85; Griffiths Adm. v. Vertner, 5 How. 736. In Pennsylvania and Alabama, orphans' courts are courts of record and would seem to stand nearly on the same basis as to presumptions, &c., as other courts of superior jurisdiction. Freeman on Judgments (3 ed.) section 122. The probate courts in Arkansas, Minnesota, Missouri, South Carolina, and California stand upon a similar basis, as being courts of record; Dayton v. Mintzer, 22 Minn. 393; Johnson v. Beazely, 65 Mo. 250; McCauley v. Harvey, 49 Cal. 497. See State of Ohio v. Hinchman, 27 Pa. St. 479; Turner v. Malone, 24 S. Car. 398.

Courts martial. — See Dynes v. Hoover, 20 How. (U.S.) 65.

Mayors' courts in England. — M Daniel v. Hughes, 3 East 367;
Westoby v. Day, 2 E. & B. 603; Fisher v. Lane, 3 Wils. 297. The general result of the cases seems to be that the main distinction between courts of different grades of jurisdiction depends upon the question whether the court under consideration has a general common law or equity jurisdiction, or whether its powers are limited and defined by a statute creating it.

It is not of importance that the general common law or equity jurisdiction is limited to particular classes of persons and circumstances, as is the case with the United States courts. Nor is it of importance that the jurisdiction is limited by the amount in controversy, as is the case with most of the county and similar courts. If the court is one possessing general common law or equity powers, even though conferred by statute, the court will be one of general and superior jurisdiction, and its judgments will be supported by the presumptions attending the judgments of superior courts, and will be conclusive in the same respects. If, on the other hand, the court is one of limited or limited statutory jurisdiction, the court will be regarded as an inferior one, and the effect of its judgments will be limited, in certain respects. As we have seen, these general conclusions are subject to many modifications in the different jurisdictions. The tendency of modern decisions seems to be toward doing away with the distinctions pointed out, but, for the present the distinctions seem to be too well grounded in the cases to be successfully attacked.

II.

Attacking Judgments of Courts of Superior Jurisdiction collaterally.

(a) Presumptions as to records of superior courts, where the courts act within their ordinary limits of jurisdiction. - The records of superior courts are always supported by the presumption that whatever was done by them in the course of the exercise of their powers, was rightly done. Consequently the rule is now well settled that where a judgment or decree of a court of superior jurisdiction is brought up collaterally in other proceedings, it will be, primâ facie, sustained by the presumption of omne rita acta. This is true even where the record does not affirmatively show that the court obtained jurisdiction of the parties or of the subject-matter, where the court acts under general powers; Ferguson v. Crawford, 86 N. Y. 609; Pennington v. Gibson, 16 How. 65; Peacock v. Bell, 1 Saunders 73; Turrell v. Warren, 25 Minn. 9; Venable v. McDonald, 4 Dana 336; Wright v. Watson, 11 Humph. 529; Hall v. Law, 2 W. & S. 135; Bridgeport v. Blinn, 43 Conn. 274; Board of Commrs. v. Markle, 46 Ind. 96; Dwiggins v. Cook, 71 Ind. 579; Clark v. Sawyer, 48 Cal. 133; Folger v. Columbian Ins. Co., 99 Mass. 267 (273); Lockwood v. State, 1 Carter 161; Galpin v. Page, 18 Wall. 350; Yates v. Lansing, 5 Johns. 282; Chemung Bank v. Judson, 4 Seld. 254; Hart v. Seixas, 21 Ward 40; Wright v. Douglas, 10 Barb. 97, Tallman v. Ely, 6 Wis. 244; Huntington v. Charlotte, 15 Vt. 46; Wright v. Marsh, 2 Greene 94.

"It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also."

Field J. in *Galpin* v. *Page*, *supra*, at p. 365. Where, however, the record of a superior court *affirmatively*, and *on its face* shows that there was a want of jurisdiction, the judgment may be attacked collaterally, even in the jurisdiction where it was

rendered, and this where the party relying upon the judgment pleads it, and the adverse party relies upon a plea amounting to nul tiel record; Wright v. Boynton, 37 N. H. 9; Judkins v. Union Mutual Ins. Co., 37 N. H. 470; Thurber v. Blackburne, 1 N. H. 242; Hall v. Williams, 6 Pick. 232 (247); Smith v. Smith, 17 Ill. 482. See Holt v. Alloway, 2 Blackf. (Ind.) 108; Welch v. Sykes, 3 Gilm. 197; Reed v. Wright, 2 Greene (Ia.) 15.

In Buchanan v. Port, 5 Ind. 264 and Davis v. Lane, 2 Ind. 548, it was held that a plea amounting to an attack upon the record of the former judgment was not effectual.

- (b) Affirmative finding of jurisdictional facts in the judgment, decree or findings of a superior court:—
- (1) Where the judgment questioned collaterally is a domestic one.—It is now well settled that where a superior court of the domestic jurisdiction affirmatively passes upon the jurisdictional facts, and this fact is shown by its record, such a finding cannot be collaterally questioned.

This is often spoken of as an instance of the operation of a conclusive presumption. It is conceived that this is not an accurate statement of the theory of law. It does not belong to the presumptions at all, but is simply and purely a positive rule of law. A presumption is a rule of evidence, - an intendment of law which, in certain circumstances, excuses a party from producing evidence. The rule here is simply a branch of the general rule that where a superior court passes upon any fact within the general scope of its powers, such action is binding upon parties to the action and those claiming under them, and becomes res adjudicata from thenceforward. Its action is subject to review only upon appeal or proceeding in error, or, in certain instances, in equity actions to set aside the judgment; Granger v. Clark, 22 Me. 128; Peck v. Woodbridge, 3 Day 30; Sims v. Slackum, 3 Cranch 300; Cook v. Darling, 18 Pick. 393; Richards v. Skiff, 8 Ohio St. 586; Grignon's Lessee v. Astor, 2 How. 319; McCauley v. Fulton, 44 Cal. 356; Pritchard v. Madren, 24 Kas. 486; Safferans v. Terry, 12 S. & M. 690; Barnett v. Wolf, 70 Ill. 76; Searle v. Galbraith, 73 Ili. 269; Case of Sheriff of Middlesex, 11 Ad. & El. 273; State v. Tipton, 1 Black 166; State v. Woodfin, 5 Ired. 199; Anderson v. Wilson, 100 Ind. 402; White v. Crow, 17 Fed. R. 98; Mack v. Ins. Co., 4 Hughes C. C. 61; Hunter v. Stonebruner, 92 III.

75, In re Fernandes, H. & N. 717; Burdett v. Abbott, 14 East 1, semble accord. Cooper v. Sunderland, 3 Clarke 114; People v. Kelly, 24 N. Y. 74; Commonwealth v. Newton, 1 Grant 453.

The return by an officer of proper service, when made a part of the judgment roll, will be conclusive; Brown v. Turner, 11 Ala. 752; Lightsey v. Harris, 20 Ala. 409. In Callen v. Ellison, 13 Ohio St. 446, a record of a judgment was produced in a collateral proceeding. The record showed that certain defendants had confessed judgment by their attorney. It was sought to be shown that the power of attorney on file did not purport to be signed by some of the defendants. It was held that, in a domestic proceeding such evidence could not be received to impeach the record collaterally. Cf. Wetherill v. Stillman, 65 Pa. St. 105; Tant v. Wigfall, 65 La. 412; Lapham v. Briggs, 27 Vt. 26; Pritchett v. Clark, 5 Harr. 63; Latterett v. Cook, 1 Clarke (Iowa) 1; Westcott v. Brown, 13 Ind. 83; Rocco v. Hackett, 3 Bosw. 579. But see Shumway v. Stillman, 6 Wend. 442 (452); Black v. Black, 4 Bradf. 174; Bissell v. Wheelock, 11 Cush. 277. The general rule was affirmed in Walbridge v. Hall, 3 Vt. 114; Burt v. Delano, 4 Cliff. 611; Dunham v. Wilfong, 69 Mo. 355; Turrell v. Warren, 25 Minn. 9.

(2) Where the judgment sought to be questioned collaterally is a foreign one, or that of a superior court of another state.—
The judgments of the courts of the different states, when brought forward in states other than those in which they are rendered are not, in strictness, foreign judgments in the sense that judgments rendered by the tribunals of other countries are foreign. Section 1 of Article 4 of the Constitution of the United States, declares that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," &c. Nevertheless, the courts in many states have held that this did not prevent the courts of other states, when a judgment even of a superior court of a sister state, was set up as a basis of rights or claims, from inquiring, in certain cases, into the jurisdiction of the court which rendered the original judgment.

It is beyond the scope of this note to go into the general subject of methods of obtaining jurisdiction, but perhaps a restricted treatment will be pertinent. The plainest form in which the question arises, is, where there is apparent on the record an attempt on the part of the tribunals of one state,

to exercise jurisdiction outside of the borders of such state — to obtain jurisdiction, say, of a non-resident person without attachment or personal notice, and without jurisdiction in rem of the sufficiency of the service the legislature of a state is not the sole judge. "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other form, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

In personal actions jurisdiction, to be of extra-territorial validity, must be by voluntary appearance, by personal service within the state, or, in a limited degree, by attachment; Pennoyer v. Neff, 95 U. S. 714; D'Arey v. Ketchum, 11 How. 165; St. Clair v. Cox, 106 U. S. 350; Boswell's Lessee v. Otis, 9 How. 336; Eliot v. McCormick, 144 Mass. 10, and many cases. In like manner, the jurisdiction obtained by attachment is valid in a personal action, only to the extent of the property subject to the control of the sovereignty wherein the attached goods are found. It will not furnish a basis for an action on the judgment in another state; Kilburn v. Woodworth, 5 Johns. 37; Robinson v. Ward, 8 Johns. 86; Downer v. Shaw, 22 N. H. 277; Phelps v. Holker, 1 Dallas 261; Kibbe v. Kibbe-Kirby, 119; Bissell v. Briggs, 9 Mass. 462.

Jurisdiction of a foreign corporation cannot be obtained by service upon one of its officers, in a state where it has no place of business. A judgment so obtained is open to collateral question in another state; Moulin v. Insurance Co., 4 Zab. 222. See M'Quen v. Middletown Man. Co., 16 Johns. 5, dictum; Bushel v. Commonwealth Ins. Co., 15 S. & R. 173 (176); Riddlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301; Libby v. Hodgdon, 9 N. H. 394 (396); Peckham v. North Parish, 16 Pick. 274 (286).

It has been held that, upon a suit upon the judgment of one state in the courts of another, the defendant may deny the authority of the attorney who appeared for him. (See for cases) Beltzell v. Nosler, 1 Clarke 588. In Gleason v. Dodd, 4 Mete. 333, (decision per Shaw, C. J.) in an action in Massachusetts upon a judgment of a superior court of Maine, it was held that, although the record recited an appearance by the judgment debtor in the Maine suit, this might be contradicted.

The underlying principle of this decision seems to be that while full faith and credit is to be given in one state to the judicial acts of another, this will not preclude the courts of the state where the record is produced from inquiring in every case, whether the sovereignty which assumed jurisdiction had in truth the jurisdiction which it assumed. See Carlton v. Bickford, 13 Gray 591; Norwood v. Cobb, 15 Tex. 500; Foster v. Glazener, 127 Ala. 391; Graham v. Spencer, 14 Fed. R. 603; Wood v. Wood, 78 N. Y. 624; Cross v. Cross, 108 N. Y. 628. But see Bimeler v. Dawson, 4 Scarm. 541; Pringle v. Woolworth, 90 N. Y. 502. The case of Borden v. Fitch, 15 John's R. 121 sustains the same principle, viz., that a decision of a jurisdictional fact decided in favor of the jurisdiction, in the tribunal — here the legislature — of one state, is not conclusive when the judgment is questioned in another state. United States courts of the same district, as that of the state in which the judgment of the former is relied on, are, perhaps, not foreign to the tribunal of the state within this rule. See Turrell v. Warren, 25 Minn. 9; Chemung Canal Bank v. Judson, 4 Seld. 254. But see Boisse v. Dickson, 31 La. Ann. 741.

Where a judgment obtained in one country is sought to be made the basis of rights in another and foreign one, the jurisdiction may always be made the subject of inquiry, whether the defect appears upon the face of the record or not. Buchanan v. Rucker, 9 East 192; Reynolds v. Henton, 3 C. B. 186; Cowan v. Braidwood, 1 M. & Gr. 882; Ferguson v. Mahon, 11 Ad. & E. 179; Douglas v. Forrest, 4 Bing. 686; Sheehey v. Professional Life Assurance Co., 3 C. B. N. S. 597; Bank of Australia v. Nias, 16 Q. B. 717; Meens v. Thellusson, 8 Exch. 638.

The presumption of regularity in the proceedings of superior courts will always furnish primâ facie evidence of jurisdiction, where the contrary does not appear—this in suits in states other than those in which the judgment was recovered, as well as in the domestic tribunal; Hatcher v. Rocheleau, 18 N. Y. 86; Bimeler v. Dawson, 4 Scarm. 541. See as to the judgment of United States courts; Pearce v. Winter Iron Works, 32 Ala. 68; Wright v. Marsh, 2 Greene (Ia.) 94.

(c) Where the defect of jurisdiction appears upon the face of the record. — Where the record affirmatively shows a defect

of jurisdiction, the judgment, even of a superior court, may always, both at home and abroad, be attacked collaterally. This is true whether, as in *Crepps* v. *Durden*, the jurisdictional defect is one which arises from a mistake in going beyond the scope of the law by the court, or is due to a failure to obtain jurisdiction of the person of the defendant; Lessee of Moore v. Starks, 1 Ohio St. 369; Hollingsworth v. Barbour, 4 Pet. 466; Webster v. Reid, 11 How. 437; Shrivers Lessees v. Lynn, 2 How. U. S. 43, *dictum*; Clark v. Bryan, 16 Md. 171; Messinger v. Kintner, 4 Birm. 97; Babbitt v. Doe, 4 Ind. 355; Lamar v. Commrs., 21 Ala. 772; Dempster v. Purnell, 3 M. & Gr. 375; Coan v. Clow, 83 Ind. 417.

(1). Where superior courts act outside of their ordinary general jurisdiction, under special statutory powers. - It seems to be the weight of authority that when a court of superior jurisdiction acts under a special act, and for a special and limited purpose, the courts, even of the domestic jurisdiction, will not call forth the ordinary presumptions in favor of jurisdiction. Compliance with the statute must be shown of record, or the judgment, when questioned collaterally, will be treated as a nullity. The cases show many modifications of this general proposition. The principle itself is, perhaps, in fact, a survival of the traditions of the old courts, in which every encroachment of the legislative branch of government upon the domain of the common law was viewed with jealousy. It is, perhaps, peculiarly out of place in code states where, as a rule, the powers and jurisdiction of all courts are largely defined by statute. Nevertheless, the principle is frequently asserted, in spite of the fact that it is, in many specific instances, disregarded in practice. The numerous modifications of the rule are beyond the scope of this note. "Where a statute prescribes a new proceeding, whether unknown to the common law or contrary thereto, the statute, so far, at least, as those parts essential to the jurisdiction are concerned, must not only be proved, but shown to have been strictly pursued, or the proceedings will be a nullity." Whyte, J., in Earthman v. Jones, 2 Yerg. 484, (493). In accord, Foster v. Glazener, 27 Ala. 391; Thatcher v. Powell, 6 Wheat. 119; Cone v. Cotton, 2 Blatchf. 82; 11 Phil. on Ev. (Cowen & Hill's Notes) 2d ed. p. 906, note 637; Commrs. v. Thompson, 15 Ala. 134; Bridge v. Ford, 4 Mass. 641; Perrine v. Farr, 2 Zab. 356; Queen v. Bloomsbury, 4 E. & Bl. 520;

Webster v. Reed, 11 How. 437; City of St. Louis v. Gleason, 93 Mo. 33.

Where a judgment in New York in partition was questioned collaterally in a New York court, the statute providing a specific method by which unknown parties could be served, and the record did not affirmatively show full compliance, the court held that no presumptions could be called in to support the record; Denning v. Corwin, 11 Wend. 647. As to the general principle, see M'Kim v. Mason, 3 Md. Ch. 186; Matter of Underwood, 3 Cow. 59; Messinger v. Kintner, 4 Birm. 97; Smith v. Rice, 11 Mass. 507; Proctor v. Newhall, 17 Mass. 81; Thatcher v. Powell, 6 Wheat. 119; Jackson v. Esty, 7 Wend. 148; Rea v. M'Eachron, 3 Wend. 465; Atkins v. Kinnan, 20 Wend. 241; Boswell's Lessee v. Otis, 9 How. 336. Semble, accord, Mason v. Tuttle, 75 Va. 105. In Bloom v. Burdick, 1 Hill, 130, the judgment was held void because the court was acting under special statutory powers and the jurisdictional facts affirmatively appeared of record not to be present. See Foot v. Stevens, 17 Wend. 483; Hart v. Seixas, 21 Wend. 40. Under confiscation acts and acts of a like nature, the courts have always insisted upon a strict compliance with the act under which action was taken, as to all jurisdictional points; Chapman v. Phœnix National Bank, 85 N. Y. 437 (Reversing 12 J. & S. 340); Windsor v. McVeigh, 93 U. S. 274; Day v. Micon, 18 Wall. 156; Conrad v. Maples, 96 U.S. 279. Where an adjudication in bankruptcy of the United States District Court was offered in a suit in a New York state court, it was held, it seems, that the jurisdictional facts need neither appear of record nor be shown; Cone v. Purcell, 56 N. Y. 649; Rosenthal v. Plumb, 25 Hun 336.

III.

Inferior Courts.

Inferior courts stand upon a very different basis from superior courts in most jurisdictions as to the standing and conclusiveness of their records. It may be stated as a general principle, subject to many contrary decisions, that the record of an inferior court must show jurisdiction upon its face, in order to have primâ facie standing against collateral attack (a).

(a) Presumptions as to records of inferior courts where the courts act within their ordinary limits of jurisdiction.—It seems to be fairly established as a general rule, that the record of a court of inferior jurisdiction must, in order to be good, primâ facic, against collateral attack, show jurisdiction. This is true, even where the attack is in the domestic tribunals. There is much conflict of decision upon this point, but, on examination, it will commonly be found that where the rule has been interpreted the other way, the result is due to the fact that the court, the decision of which was questioned, has been regarded really as a superior one, by the higher courts of the same sovereignity.

The rule is as has been stated above, in the following states: Missouri: Cunningham v. Pacific Rv. 61 Mo. 33; Fisher v. Davis, 27 Mo. App. 321; France v. Evans, 7 West. Rep. 277; Hausberger v. Pacific Ry. 43 Mo. 200; State v. Metzger, 26 Mo. 65. Massachusetts: Smith v. Rice, 11 Mass. 506; Hathaway v. Clark, 5 Pick. 490; Heath v. Wells, 5 Pick. 140; Holvoke v. Haskins, 5 Pick. 20. Semble, Jenks v. Howland, 3 Gray 536; Brooks v. Adams, 11 Pick. 441; Brooks v. Graham, 11 Pick, 445; Commonwealth v. Hay, 126 Mass. 235. New York: Rea v. M'Eachron, 13 Wend. 465; Atkins v. Kinman, 20 Wend. 241; Ford v. Walsworth, 15 Wend. 449; 19 Wend. 334; s. c. again. Dakin v. Hudson, 6 Cow. 221. But see Barnes v. Harris, 4 Const. 374; Van Deusen v. Sweet, 51 N. Y. 378. Pennsylvania: (Doubtful) Messinger v. Kintner, 4 Birm. 97; Camp v. Wood, 10 Watts 118. Semble, of contrary bearing, Franklin v. Goff, 14 S. & R. 181; Lockhart v. Johns. 7 Pa. St. 137; Mc-Hale's Appeal, 105 Pa. St. 323; See McKee v. McKee, 14 Pa. St. 231; Illinois: Evans v. Pierce, 3 Seamon 468; Douglas v. Whiting, 28 Ill. 362; Pardon v. Devine, 23 Ill. 572. Georgia: Grier v. McLandon, 7 Ga. 362. Michigan: Mudge v. Yaples, 58 Mich. 307; Clark v. Holmes, 1 Doug. 390. Maine: Granite Bank v. Treat, 18 Me. 340; New Hampshire: See the State v. Richmond, 6 Fost. 232, see 241 et sey. Arkansas: McClure v. Hill, 36 Ark. 268; Webster v. Daniel, 47 Ark. 131, at p. 141. New Jersey: Bergen Turnpike Co. v. State, 1 Dutch. 554. Iowa: Morrow v. Weed, 4 Clarke 77; United States Jurisdiction: Florentine v. Barton, 2 Wall. 210. Alabama: Sims v. Waters, 65 Ala. 442. Kentucky: See Hart v. Grisby, 14 Bush. 542. Indiana: Anderson v. Miller, 4 Blackf. 417; See Carr v. Goda,

84 Ind. 209; Carver v. Carver, 64 Ind. 194. (Here the question came up directly on appeal, and not collaterally.) Hopper v. Lucas, 86 Ind. 43. Ohio: McCurdy v. Baughman, 1 West. Rep. 33. Mississippi: See Edwards v. Tumer, 14 S. & M. 75; Smith v. State, 13 S. & M. 140. But see Taggert v. Wise, 60 Miss. 870. Connecticut: Wattles v. Hyde, 9 Conn. 10; Hall v. Howd, 10 Conn. 514; Stern v. Scott, 8 Conn. 480.

Many of the above cases are to be considered in the light of the fact that the actions were under special statutes of a limited character, under which even courts of superior jurisdiction would have been held to strict limits as to showing jurisdiction.

The early rule in England, as unaffected by latter statutes and decisions, seems to be the other way, even on appeal; Rex v. Cleg, 1 Str. 475; Rex v. Venables, 1 Str. 430. But see Connett v. Morley, 1 Q. B. 18. In Texas the courts of justices of the peace, being established by the Constitution, are held practically to be superior courts. The rule then, as to such courts, seems to be that the same presumption holds as to them as that which applies to superior courts; Williams v. Ball, 52 Tex. 603; Holmes v. Buckner, 67 Tex. 107. A similar view seems to obtain in Misssouri as to probate courts; Rowden v. Brown, 91 Mo. 429; Brooks v. Duckworth, 59 Mo. 49; Johnson v. Beazeley, 65 Mo. 250. But a contrary view has been sustained as to justices of the peace; Bersch v. Schneider, 27 Mo. 101. A like view has obtained in California as to probate courts. Inco v. Commercial Bank, 70 Cal. 339. · All reasonable intendments are made in Alabama in favor of the decrees of an Orphan's Court; dictum; Key v. Vaughan, 15 Ala. 497. The general principle is stated, in Lessee of Grignon v. Astor, 2 How. 319, to be that jurisdictional facts must appear of record, to render the judgment of an inferior court of primâ facie validity.

In Rhode Island, by special statute, the jurisdiction is presumed; Angell v Angell, 14 R. I. 541. And see Stern v. Bennett, 24 Vt. 303; Lawrence v. Englesby, 24 Vt. 42; Williams v. Sharp, 2 Cart. (Ind.) 101; Denve v. Hanlon, 21 N. J. L. 582; Painter v. Henderson, 7 Pa. St. 48; Samuels v. Findlay, 7 Ala. 635; Hew v. Hew, 5 Pa. St. 428; M'Farland v. Burdick, 17 Vt. 165; Moore v. Houston, 3 S. & R. 169; Pierce v. Irish, 31 Me. 254; Cox v. Davis, 17 Ala. 714; Savage v. Benham, 17

Ala, 119; Farrar v, Olmstead, 24 Vt. 123; Billings v, Russell, 23 Pa. St. 189.

- (b) Where there is an affirmative finding of jurisdictional facts in the judgment of an inferior court.—The question is whether, or not, where the question of jurisdiction of an inferior tribunal is raised collaterally, and there is an express finding of the jurisdictional facts, the decision is conclusively binding, is one which has received a different answer in different states.
- (1) It is universally held that an affirmative finding of jurisdictional facts by a domestic and inferior tribunal is primâ facie evidence of such facts; Wetherell v. Goss, 26 Vt. 748, semble; Hawkes v. Baldwin, Brayt. 85, semble; Staniford v. Barry, 1 Aik. 321, semble; Brown v. Foster, 6 R. I. 564; Reed v. Whilton, 78 Ind, 579.
- (2) The judgment of a domestic inferior court. But the question whether or not it is conclusive like any other decision of a court, upon facts brought up before it for adjudication, is differently decided in different states. It would seem that the general view is that such a finding is conclusive in the domestic tribunals. See Sheldon v. Wright, 1 Seld. 497, at 514: Turner v. Malone, 24 S. C. 398 (semble, the court, a probate court, was regarded as a superior one); Epping v. Robinson, 21 Fla. 36; McCurdy v. Baughman, 1 West. 33 accord. That a judgment of an inferior court, even where it recites affirmatively a finding of jurisdictional facts, may be impeached collaterally in the domestic jurisdiction. See, Wood v. Wood, 78 Ky. 624; Clark v. Holmes, 1 Doug. 390; Black v. Black, 4 Bradf. 174; Smelyer v. Lockhart, 97 Ind. 315.
- (3) Where the judgment sought to be questioned is that of an inferior court of a foreign jurisdiction or of another state. Where the judgment which is sought to be questioned, is that of an inferior court of another state, the jurisdictional facts must be shown. If the inferior court acted under a special statute, that must be proved as a fact as a part of the case of the party who presents the record; Thomas v. Robinson, 3 Wend. 267; Hofheimer v. Losen, 24 Mo. App. 652; Wood v. Wood, 78 Ky. 624. But see contra: State of Ohio v. Hinchman, 27 Pa. St. 479.
- (c) Where the defect of jurisdiction appears on the face of the record.—Where the record of the proceedings of an inferior court, when the judgment is questioned, even in a domestic tribunal, affirmatively shows a defect of jurisdiction, the pro-

ceedings are primâ facie void; Conkey v. Kingman, 24 Pick. 115; Hendrick v. Cleveland, 2 Vt. 329; Clapp v. Beardsley, 1 Aik. (Vt.) 168; Jones v. Jones, 3 Dev. 360; Munroe v. People, 102 Ill. 406; Dale v. Irish, 2 Barb. 639; Holmes v. Field, 12 Ill. 424; State v. Rye, 35 N. H. 368. cf. Sigourney v. Sibley, 21 Pick. 101; Gay v. Minot, 3 Cush. 352.

(d) Where inferior courts act under special statutory powers. — What is true of superior courts in a more limited degree, is, it seems, true to the fullest extent of inferior courts, viz., where they act under special statutory powers, the record must show that they have conformed with substantial exactness to the requirements of the statute, or the whole proceeding is primâ facie void; Wattles v. Hyde, 9 Conn. 10; Ford v. Walsworth, 15 Wend. 449; Dakin v. Hudson, 6 Cow. 24; Hathaway v. Clark, 5 Pick. 490; Heath v. Wells, 5 Pick. 140; Holyoke v. Haskins, 5 Pick. 20; Camp v. Wood, 10 Watts 118; Bergen Turnpike Co. v. State, 1 Dutch. 554.

LIABILITY OF JUDGES, OFFICERS, PARTIES, AND OTHER PERSONS, FOR ACTS DONE IN PURSUANCE OF JUDICIAL AUTHORITY, OR IN A JUDICIAL CAPACITY.

I.

Suits against Judges of Superior Courts.

It would now appear to be settled to a degree of certainty, and it may be stated as a general proposition, that a judge of a superior court of record is not liable to a private suitor for any act whatever done in a judicial capacity. This is true, however erroneous such act may be. It is true, even as to acts done with the most express malice. The judge is liable to impeachment and removal, but the private suitor has no direct remedy for injuries which he may have suffered.

As to the case where, as in *Crepps* v. *Durden*, the judge has once acquired jurisdiction, but goes beyond and outside of it, being obliged to pass upon the law as to the extent of his jurisdiction, it is now probably settled in most jurisdictions, beyond a reasonable controversy, that the judge of a superior court is not responsible for any of his acts.

Where there never existed any jurisdiction in the judge to

act at all in the premises, the law is not so clearly settled. The same may be said of the case where a judge of a superior court acts without obtaining jurisdiction of the person of the party who complains of his acts. This latter case must, of course, be carefully distinguished from that in which a judge acts upon evidence which is in fact untrue, but which is sufficient on its face to entitle the judge to act. This case of action upon evidence apparently sufficient as to jurisdictional facts, is treated infra, and comes under a different rule from that affecting the subject now discussed.

The weight of authority seems to be that a judge of a superior court of record is not liable civilly for any act whatever done while acting judicially. There is respectable authority to the effect that this view is too broad; but, on the whole, it would seem to be fairly established, the main criticisms being directed, as intimated above, to the application of the rule to cases where there never existed any jurisdiction to act at all, or where there is a failure of jurisdiction of the person complaining of the judge's act.

The main difficulty comes in determining when a judge may be said to be acting judicially. Is he always acting judicially when sitting at the place of holding court and in the seat of justice? May it be said of a judge of a superior court, as it was, in Crepps v. Durden, of a judge of an inferior court, that whenever he transcends his jurisdiction his proceedings are coram non judice, and, pro tanto, subject him to liability? he liable for the consequences of ministerial acts? It would seem that an understanding of the present state of the law as to these and related points can best be reached by a consideration of the growth, historically, of the law bearing upon them. In treating this branch of the subject, the early cases which are cited mostly refer to inferior judicial officers, but are quoted as exhibiting the growth of the law bearing on the special head now discussed; regard being had, also, to the next point, - as to the liabilities of judges of inferior courts. Book of Assise, 21 Edw. III. Hil. Term, pl. 16 (1347), seems to be the first appearance in the books of the general question of liability for judicial acts. The defendants were sued for conspiracy. It was held to be an answer to the action that the defendants were grand jurors, and had found the indictment in the matter complained of.

Book of Assise, 27 Edw. III. Mich. J., pl. 18, p. 135 (1353), was a case in which R. was indicted for that, being a judge of over and terminer, certain persons were arraigned before him for trespass, and he entered of record that they were indicted for felony. It was demanded that he should be held for falsifying the record. It was held that the presentment was bad.

Year-Book, 9 Henry VI. Hil. pl. 9, p. 60 (1431), was a case of an action against an escheater for fraud. The court said that no such action lay against a judge of record, but in the case at bar it was otherwise; for an escheator is not a judge of record,

but his office is an office of record.

9 Edw. IV. pl. 10, p. 3 (1470), intimated that no action lay against a justice of the peace for judicial acts.

Year-Books, 21 Edw. IV. pl. 49, p. 67. Pigot, J.: If a justice of the peace does anything apart from his office, he may be held liable; but in sessions, otherwise.

Floyd v. Barker, 12 Coke 23 (1608). A grand inquest had been indicted for felony in the county of Anglesea. It was held in Star Chamber that neither the indictors, nor, among others, the judges of assize, could be questioned in the Star Chamber for what they had done. The court said: "And the reason and cause why a judge, for anything done by him as a judge, by the authority which the king hath committed to him, and as sitting in the seat of the king (concerning his justice), shall not be drawn in question before any other judge for any surmise of corruption, except before the king himself, is for this; the king himself is de jure to deliver justice to all his subjects; and for this, he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath." The court clearly mark the distinction between the courts of record and those not of record.

The Case of the Marshalsea, 10 Coke 68 (1613). Hall brought trespass for assault, &c., and false imprisonment, against various defendants. The defendants justified as officers and judges of the Court of Marshalsea, and pleaded prescription for the court, the prescription giving it limited and special powers. "It is agreed in the point, also, that in trespass before the steward and marshal, if none of the parties be of the king's household, then it is coram non judice, because they exceed their power. The same law, if they hold plea out of the verge. . . . But when the court has not jurisdiction of the cause, then the whole proceed-

ing is *coram non judice*, and actions will lie against them without any regard of the precept or process."

Aire v. Sedgwick, 2 Rolle 195 (1619). The court intimates the doctrine of immunity to a judge for anything done in a judicial capacity.

Martin v. Marshal, Hobart 63 (prior to 1646). Defendants were sued for false imprisonment. They pleaded that one was mayor, and held court at York by prescription; that the other was serjeant of the court, and the latter acted by command of the former. The plea did not bring the case within the prescription as pleaded. Held, that defendants were liable.

Terry v. Huntington, Hardres 480 (1680). The case was a suit against commissioners of excise for assessing low wines as strong wines. The court held that they had no jurisdiction so to act, and were liable. Hall, C. B.: "First, the matter here is not within their jurisdiction, which is a stinted, limited jurisdiction; and that implies a negative, viz., that they shall not proceed at all in other cases. . . . Thirdly, if such commissioners exceed their authority, what they do is coram non judice; and then, as appears 10 Rep., their officers are not privileged."

Bushell's Case, 1 Mod. 119 (1686), came up on a motion for time to plead by the Lord Mayor of London and the recorder. One Bushell brought an action for false imprisonment. Hale, C. J., said: "I speak my mind plainly, that an action will not lie; for a certiorari and a habeas corpus, whereby the body and proceedings are removed hither, are in the nature of a writ of error; and in the case of an erroneous judgment given by a judge which is reversed by a writ of error, shall the party name an action of false imprisonment against the judge? No, nor against the officers, neither. Time was given as prayed.

Hamond v. Howell, 1 Mod. 184 (1686). This was another phase of the matter stated in the preceding case. The plaintiff brought an action for false imprisonment against the mayor of London, the recorder, the whole court of Old Bailey, and the sheriffs and gaoler, for false imprisonment. Some Quakers had been indicted for a riot. The court directed a verdict of guilty, but the jury found for defendants; and the jury were committed for finding contrary to direction in matter of law. One of the jury brought this action, after being discharged on habeas corpus. Defendants moved for further time to plead. The court declared their opinions against the action. Atkins, Justice: "It was never

imagined that justices of over and terminer and gaol delivery would be questioned in private actions for what they should do in execution of their office."

Gwinne v. Pool, Lutw. 935 (1693). Action was brought in trespass against a judge and officers of an inferior court. On a demurrer to a reply of want of jurisdiction, defendant had judgment. On the appeal (Lutwyche, 1560), the court said that no action whatever lay where the court had jurisdiction (see especially, p. 1511). It was held that the action was not well brought, as it did not appear that defendant had knowledge of his want of jurisdiction.

Groenvelt v. Bruwell, 1 Ld. Raym. 454 (1700). Plaintiff sued the defendants, as censors of the College of Physicians of London, for false imprisonment. They had condemned him for malpractice. Judgment was given for the defendants, the court saying that the action of the censors, they having jurisdiction, could not be elsewhere questioned.

Smith v. Dr. Bouchier, 2 Strange 993 (1735). This case was one of a suit brought for false imprisonment against the vice-chancellor of the University of Oxford and certain officers of his court. It was pleaded that the defendant B. was vice-chancellor, &c., and that by the custom, if a suitor swore that he believed that his opponent would run away, the opponent might be arrested and held; that A. B. swore that plaintiff in this suit owed him a debt, and complainant believed that the then defendant—plaintiff here—would run away. The plea did not exactly follow the custom as pleaded. Demurrer. The plea was held to be bad, the court saying that, as the defendants were joined together, and as the judge and the plaintiff in the suit knew that the oath was not sufficient, all were liable.

Miller v. Seare, 2 Wm. Black. 1142 (1767). Action against commissioners of bankruptcy for illegally imprisoning a person for not answering satisfactorily at an examination. De Grey, C. J.: 1st. It is agreed that the judges in the King's Superior Court of Justice, are not liable to answer personally for their errors in judgment. And this is not so much for the sake of the judges, as of the suitors themselves; Bushel's case, Vaughn 138. 2d. The like in courts of general jurisdiction, as gaol delivery, &c. 3d. In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority,

they are protected as to errors in judgment; otherwise they are not protected. The protection, in regard to the superior courts is absolute and universal; with respect to the inferior it is only while they act within their jurisdiction. The commissioners in bankruptcy were held to be of limited jurisdiction and were held liable, as they had acted beyond their jurisdiction.

Perkin v. Proctor, 2 Wils. 382 (1768). Held, that trespass lay against assignees under a commission of bankruptcy sued out against a victualler, such person not being within the Bankrupt Acts. The court said (p. 384): "And it is not like where an officer makes an arrest by warrant out of the King's Court, which if it be error the officer must not contradict, because the court hath general jurisdiction; but here (says Justice Croke) the justices of the peace have but a particular jurisdiction."

Parsons v. Loyd, 3 Wils. 341 (1772). Trespass for false imprisonment. Defendant had caused to be sued out a void writ. The writ was from a court of superior jurisdiction. Held, that defendant was liable; it did not appear that he had taken any active part in the arrest. Dictum (p. 345), that the officer executing the writ might have justified under it.

Harman v. Tappenden et al., 1 East 555 (1801). Action against T. and fifteen others. Defendants and plaintiff were members of a company of fishermen of Kent. Plaintiff was in an assembly of the company and, having broken a by-law, was ordered to pay a fine, or show cause, &c. He did neither, and without proof, was condemned to be prevented from fishing during the ensuing oyster season. Held, act of defendants was irregular, but judicial, and they could not be held, for such an act, having jurisdiction. They should, however, have taken proof.

Beaurain v. Scott, 3 Camp. 388 (Nisi Prius) (1812). Held, that where an ecclesiastical court excommunicated a man in a case where it had no jurisdiction, action will lay.

Ackerley v. Parkinson, 3 M. & Sel. 411 (1815). Action of case for excommunication. Held, that defendants (judges of the ecclesiastical court) were not liable, as they had jurisdiction, though they acted erroneously.

Taaffe v. Downes, 3 Moore's P. C. (Ireland, 1812) 41 n. Trespass for false imprisonment. Plea that plaintiff was ap-

prehended under a warrant issued by defendant acting judicially as judge of King's Bench. Demurrer. *Held*, that the plea was good.

Mayne, J.: "The difference between the judges of the superior and inferior courts has not been sufficiently attended to." As to judges of superior courts, "the honest, good and constitutional mind will always wish to find them entirely free and unbiased; and will rather entrust them with a high and unquestionable authority, and, if guilty, leave their punishment to Parliament alone, than hazard their fortitude and independence by the alarm and question, pains and expense of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind." This case is notable as being perhaps the first deliberate decision in Great Britain that seems to support the modern rule to its full extent.

Garnett v. Ferrand, 6 B. & Cr. 611 (1827). Suit against a coroner for trespass in turning plaintiff out of a room where the defendant was holding an inquest. Held, that no action lay. Tenterden, C. J.: "The court of the coroner is a court of record of which the coroner is the judge; and it is a general rule of very great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions."

Mills v. Collett, 6 Bing. 85 (1829). This case turns upon the same principle as the one preceding. The court distinguishes Crepps v. Durden.

Scott v. Stansfield, L. R. 3 Exch. 220 (1868). Action for slander. Plea, that the words were spoken by the defendant while acting as a county judge. Replication that the words were spoken maliciously, falsely, without reasonable cause, with no foundation, and not in the bonâ fide discharge of defendant's duty. Demurrer. Held, that the replication was bad. Kelly, C. B.: "The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record."

Dicas v. Lord Brougham, 6 C. & P. 249 (1833). Trespass for false imprisonment. The defendant justified as Lord Chancellor of England. He had committed the plaintiff for not obeying an order. The plea was not guilty. The court was of opinion that the defendant had authority to make the order, but it seems clear from the discussion that it would not have held defendant liable had he lacked such authority.

Calder v. Halket, 3 Moore's P. C. 28 (1839). Defendant sued in trespass for false imprisonment. Defendant was judge of a provincial magistrate's court in India. Act 21, Geo. III. ch. 70, § 24, made judge of such courts not liable for any act done as judge. Held (Parke, B.), this action is designed to place these judges on the footing of judges of superior courts of record. "For English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege. Defendant's court had no jurisdiction of Europeans, but it did not appear distinctly in the evidence that the defendant knew this. To hold defendant liable, this fact must appear.

Linford v. Fitzroy, 13 Ad. & El. (N. S.) 240 (1849). Held, that no action against a magistrate for refusing to take bail was maintainable without proof of malice.

Levy v. Moylan, 10 C. B. 189 (1850). Plaintiff sued a judge of a county court in England, a sheriff, and a keeper of a house of correction. The warrant set forth imprisonment for contempt. Held, that although the court was of inferior and of limited jurisdiction, the writ was an adjudication that the judge had been insulted, and was regular on its face. The judge had jurisdiction, and defendants were not liable.

Houlden v. Smith, 19 L. Jour. N. S. Q. B. 170 (1850). Contra, where a judge of a county court assumed to do an act beyond his territorial jurisdiction.

Ward v. Freeman, 2 Ir. C. L. 460 (1852). Held, that a judge of a court of record could not be held liable for refusing to certify an appeal. "No action will lie against a judge for what he does judicially, though it should be laid falso malitiose et scienter;" Barnadiston v. Soame, 6 St. Tr. 1096 (1674). "An action will not lie against a judge for anything done by him quaternus a judge;" Hammond v. Howell, 2 Mod. 218.

Kemp v. Neville, 10 C. B. N. S. 523 (1861). Defendant, a vice-chancellor of Cambridge University, was sued by plaintiff for false imprisonment. He had authority to imprison lewd

females found in company with undergraduates. He, in good faith, but erroneously and without due inquiry, imprisoned plaintiff. *Held*, that, as he had jurisdiction, he was not liable.

Thomas v. Churton, 2 B. & S. 475 (1862). Held, that a coroner is not liable civilly for words slanderous, falsely and maliciously spoken by him in an address to a jury.

Miller v. Hagaart, 2 Shaw's App. Cas. (Scotch) 125 (1824). Similar decision as to words addressed by a superior court

judge to counsel in course of a trial.

Fray v. Blackburn, 3 B. & S. 576 (1863). The declaration alleged that defendant was a judge of the Court of Queen's Bench. That plaintiff was a suitor before him. That she became entitled to costs, but defendant refused to make the rule absolute for them, defendant knowing the premises, and not regarding his duty, &c. Demurrer. Judgment for defendant. Plaintiff applied for leave to amend, to introduce an allegation of malice and corruption. Leave refused.

Compton, J.: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good."

The foregoing cases comprise by no means the entire list of English cases bearing upon the point under discussion. The more complete list of authorities in the English courts is to be found in the English note. The cases have been chosen merely to show the development of the rule and its relation to the views held by American courts upon the same subject. In this country the decisions have brought about much the same result. The earlier decisions relate to courts of inferior or limited jurisdiction; but some are cited here as showing the development of the law.

Phelps v. Sill, 1 Day 315 (1804). It was held that a judge of probate was not liable for failure to take security. "No man," says the court, "would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend." See Hamilton v. Williams, 26 Ala. 529 (1855). Accord.

Yates v. Lansing, 5 Johns. R. 282 (1810). This is a leading case upon this subject. In this case the plaintiff sued in an

action of debt for a penalty. The declaration alleged that plaintiff was arrested by the sheriff under a writ issuing out of the Court of Chancery. That plaintiff sued out a writ of habeas corpus before one of the judges of the supreme court, and was discharged under the writ. That afterwards the sheriff, "knowingly," &c., caused the plaintiff to be re-arrested. There was a statute providing the penalty sued for if any one caused the re-arrest of one discharged on habeas corpus. The defendant pleaded that at the time of and before the arrest he was chancellor of the state of New York. That as such he, acting judicially, issued the writ on which plaintiff was first imprisoned, and caused the plaintiff to be committed. That afterward plaintiff was discharged on habeas corpus. thereupon defendant, "as chancellor of this state and not otherwise, at a Court of Chancery," &c., made an order for the arrest of the plaintiff. To this there was a demurrer. The court held that no action lay. The court (per Kent, Ch.) held that the defendant was not liable. While the court decided that the defendant had power to make the first commitment, and that the statute imposing a penalty did not apply, the language of the court goes much farther than this, and is interesting as a discussion of the general principles.

"Where courts of special and limited jurisdiction exceed their powers," says Chancellor Kent, at page 290, "the whole proceeding is coram non judice, and all concerned in such void proceedings are held to be liable in trespass. (Case of the Marshalsea, 10 Co. 68; Terry v. Huntington, Hardres 480.) But I believe this doctrine has never been carried so far as to justify a suit against the members of the superior courts of general jurisdiction for any act done by them in a judicial capacity."

Briggs v. Wardwell, 10 Mass. 356 (1813). A justice of peace was held liable in trespass where a party was imprisoned under an execution issued only two or three hours after judgment,—the law being that none could be issued within twenty-four hours,—the court holding that issuing the execution was a ministerial act.

Lincoln v. Hapgood, 11 Mass. 350 (1814). Parker, C. J.: Held, that an action lies against the selectmen of a town for refusing the vote of a qualified voter, though there be no malice. [Questions whether defendants acted judicially or ministerially not discussed.]

Little v. Moore, 4 N. J. 74 (1818). Held, that a justice of the peace having jurisdiction was not liable for an erroneous judgment. "In courts of general jurisdiction an action never lies against the judge, because he has jurisdiction of all causes; in courts of limited jurisdiction it lies only when he exceeds that jurisdiction and therefore is not in the exercise of his judicial authority" (per curiam).

Bigelow v. Stearns, 19 Johns. 39 (1821). Trespass for false imprisonment. Defendant justified as a justice of the peace. The statute under which defendant acted provided that a person before commitment should be brought before the justice; but plaintiff here was committed by defendant without being produced. The record was regular. It was held that the plaintiff might go behind the record, and that defendant was liable, not having acted within his jurisdiction. Page 40. "If a court of limited jurisdiction issues a process which is illegal, and not merely erroneous; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person, by having him before them in the manner required by law, the proceedings are void. And in case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case, becomes a trespasser."

Cunningham v. Bucklin, 8 Cow. 178 (1828). Commissioners of insolvency were sued by a creditor of an insolvent, for discharging the insolvent, corruption being charged. The statute made their decision conclusive as to the propriety of their acts. It was held that they were not liable.

Randall v. Brigham, 7 Wall. 523 (1868). Plaintiff, an attorney-at-law, of Massachusetts, sued defendant, a judge of the Massachusetts Superior Court, for wrongful removal of plaintiff from the bar. The court below instructed the jury that the action could not be maintained, and defendant had a verdict. This ruling was sustained. Field, J.: Defendant was a judge of superior jurisdiction. "In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, where the acts in excess of

jurisdiction are done maliciously or corruptly, &c." Judge Field cites no authority for the doubt expressed in the last proposition. It would seem, however, that the action of the defendant, was, in part, proper. This case, with the law as expressed in the opinion, seems to have settled the law in the United States jurisdiction. Consult Galpin v. Page, 18 Wall. 350.

Bradley v. Fisher, 13 Wall. 335 (1871). A suit by an attorney against a judge who, sitting at regular term in the District of Columbia, had disbarred him. The plaintiff's position was, practically, that the defendant's action had been so taken as to make it coram non judice and void; the plaintiff sued for compensation. The supreme court held that the plaintiff could sustain no action. The court, in a long and well-considered opinion, said, per Field, J.: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Busteed v. Parsons (1875), 54 Ala. 393. Plaintiff sued for false imprisonment. Defendant pleaded that as a judge of the United States District Court for the Middle District of Alabama, he imprisoned plaintiff. The declaration alleged that plaintiff was imprisoned maliciously and without probable cause. Plea alleged a due complaint, &c. Issues came up on the plea, "not guilty," and a special plea. Plaintiff urged that the charge was wholly outside of the jurisdiction of the United States District Court. Held, that the defendant was not liable in any event. United States courts are of superior though of special jurisdiction. The court seems to go the full length of holding that no action whatever, of a civil nature, will lie against a judge of a superior court for anything done in a judicial capacity, even though he be in error in holding that given facts give him jurisdiction.

Lange v. Benedict, 73 N. Y. 12 (1878). Action for false imprisonment. The complaint alleged that defendant was a judge of the United States District Court for the Eastern District of New York. He presided at a circuit court. Plaintiff was indicted and convicted for stealing mail bags from the United States, the value being found to be less than \$25. By

the act defining the crime the penalty was imprisonment for one year or \$200 fine. Defendant sentenced plaintiff to both. Plaintiff paid the fine. On habeas corpus, afterward, defendant re-sentenced plaintiff to one year imprisonment. The supreme court of the United States discharged plaintiff from imprisonment. Demurrer by defendant to the complaint stating all the facts. Held, that defendant was not liable. The point discussed was really the liability for the second sentence. Folger, J.: "He [the defendant] was, in fact, sitting in the place of justice; he was, at the very time of the act, at court; he was bound by his duty to the public and to the plaintiff to pass as such, upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void."

The court had jurisdiction up to the vacating of the last sentence. "This act of the defendant was then one in excess of or beyond the jurisdiction of the court. And though where courts of special and limited jurisdiction exceed their powers, the whole proceeding is coram non judice, and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court, or one of general jurisdiction for an act done by him in a judicial capacity." See London Law Journal, Aug. 24, 1878, for approving comment.

Pickett v. Wallace, 57 Cal. 555 (1881). In this case, the complaint set forth that the defendant sitting as the supreme court, knowing that the plaintiff had not committed a contempt and not having acquired jurisdiction over his person, maliciously, &c., adjudged him guilty of a contempt and caused his imprisonment. Demurrer. The demurrer was sustained. The court said that "judges of courts of record, of superior or general jurisdiction, are not liable to civil actions for their judicial acts, even when the acts are in excess of their jurisdiction, and are alleged to have been done corruptly and maliciously." See Turpen v. Booth, 56 Cal. 65. This case goes the full length, apparently, of holding that even where no jurisdiction is acquired of the person, a superior court judge is not responsible

for his acts, while acting in a court of justice. The prevailing doctrines of the law, as expounded in Lange v. Benedict and some of the other cases supra, are scarcely likely to be changed, as was well said by Chancellor Kent in Yates v. Lansing. "No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty." The general conclusions which we reach upon a review of the cases, seem to be these: (1) That a judge of a superior court is never liable civilly for any act of a judicial character performed while sitting in the place of justice and acting judicially, provided he has jurisdiction of the person and subject-matter, however erroneous or even malicious such act may be. (2) That he is not liable civilly for any judicial act, provided he has once acquired jurisdiction of the general subject-matter and of the person, even though he exceed that jurisdiction previously acquired. (3) That he is not liable civilly for any judicial act, even though he does not in fact acquire jurisdiction of the person, if he has reason to think he has acquired jurisdiction of the person, and is called upon to pass upon the question whether or not he has jurisdiction, provided he has, or, perhaps, even has reason to think he has, jurisdiction of the general subject-matter. (4) That he is probably liable civilly, if he acts without apparent jurisdiction of the subject-matter, and of the person. (5) That he is considered to be acting judicially, whenever his act is such as falls within the general powers of a judge, even if apparently ministerial in its nature, and is sitting in the place of justice, acting with authority as judge of the court of which he is a member.

II.

Suits against Judges of Inferior Courts.

(a) Where a judge of an inferior court, or any person acting judicially, acts within his jurisdiction, erroneously, but in good faith. — Our review, historically, of the cases bearing upon the

liabilities of judges of superior courts, makes it unnecessary to go over the same ground here, as to the development of the rule bearing upon judicial officers of inferior jurisdiction. The general rule is that where a judge of an inferior court, or any person acting judicially, acts within the general scope of his jurisdiction, and in good faith, but acts erroneously, he will not be liable to any party for his action. This proposition would seem to be very clear, both from the cases and as a matter of reason; Reed v. Conway, 20 Mo. 22; Doswell v. Imfrey, 1 B. & Cr. 163; Bushell's Case, Vaughan 135; Hammond v. Howell, 1 Mod. 184; Fausler v. Parson, 6 W. V. 486; White v. Morse, 139 Mass. 162; Levy v. Moylan, 10 C. B. 189; Tyler v. Alford, 38 Me. 530; Kibling v. Clark, 53 Vt. 379; Hill v. Sellick, 21 Barb. 207; Weaver v. Devendorf, 3 Denio 117; Brown on Actions at Law, 191-200; Wheeler v. Patterson, 1 N. H. 88; Kendall v. Stokes, 3 How. U. S. R. 87; Weckeley v. Geyer, 11 S. & R. 39; Jenkins v. Waldron, 11 Johns. 114; Hitch v. Lambright, 66 Ga. 228; Linford v. Fitzroy, 13 Q. B. 240; Holcomb v. Cornish, 8 Conn. 375; Fischer v. Langbein, 103 N. Y. 84, dicta; Harman v. Brotherson, 1 Den. 537; Landt v. Hilts, 19 Barb. 283; Marks v. Townsend, 97 N. Y. 590; Miller v. Adams, 7 Lans. 133; Hamilton v. Williams, 26 Ala. 527; Lowther v. Radnor, 8 East 113; Pike v. Carter, 3 Bing. 78; Calder v. Halket, 3 Moore's P. C. 28, at p. 78; Grove v. Van Duyn, 44 N. J. Law 654; Morton v. Crane, 39 Mich. 31. Accordingly, it has been held that where a surveyor-general who, as a public officer was obliged to exercise his discretion, discharged, erroneously, a surveyor, he was not liable; Reed v. Conway, 20 Mo. 22. Where commissioners of bankruptcy, having jurisdiction of the subject-matter, decided erroneously, they were held not to be liable; Doswell v. Imfrey, 1 B. & Cr. 163. A similar decision has been reached regarding a county board of registration; Fausler v. Parson, 6 W. V. 486; action of a commander of a warship, Wilkes v. Dinsman, 7 How. (U.S.) 89; Burns v. Nowell. 5 Q. B. D. 444. School trustees who, in course of their duties, made a decision which was erroneous, but was made in good faith, were held not to be liable; Hill v. Sellick, 21 Barb. 207. An assessor of taxes, who acts judicially, though erroneously, is not liable for his erroneous act; Weaver v. Devendorf, 3 Den. 117. So it has been held that where a moderator of a town or other meeting, acts judicially, but erroneously, in refusing a vote of a

qualified voter or in any similar matter, he is not liable; Wheeler v. Patterson, 1 N. H. 88; Weckeley v. Geyer, 11 S. & R. 35, at p. 39; Jenkins v. Waldron, 11 Johns. 114.

In Kendall v. Stokes, 3 How. U. S. Rep. 87, the suit was by a government contractor against a secretary of the United States Treasury for refusing to allow, upon the government books, certain items. This was shown to be an error of judgment, but the error was without bad faith. It was held that, as the defendant acted quite in good faith, and judicially, he was not liable. See Gridley Exr., &c., v. Lord Palmerston, 7 J. B. Moore 91.

(b) Where a judge of an inferior court or any person acting in a judicial, but inferior and limited capacity, acts beyond his jurisdiction.— This includes the precise instance presented by our principal case, and although the rules of law in this regard have undergone some slight modification since the decision in Crepps v. Durden, the general rule is still in most jurisdictions substantially what it was as established by that case. The "Jervis Acts" (11 & 12 Vict. ch. 44) have not, in general, been copied in the states, and the questions touched by them have been left to be worked out by the courts.

In Grider v. Tally, 77 Åla. 422, it was held that when a probate judge, empowered and directed under the statute to grant licenses, refused a license properly applied for, he was liable. It will be observed here that the judge was held not for any positive tort committed in the exercise of his jurisdiction, but for refusing to act where the law called for action. The act was regarded as ministerial.

White v. Morse, 139 Mass. 162, is a case which, at first sight, and even, perhaps, upon consideration, may be found to be contrary to the principles established in Crepps v. Durden. In White v. Morse the defendant, a trial justice, rendered a judgment for costs in violation of a statutory provision, and the plaintiff sued for acts done under that judgment. It was held that the defendant was not liable, the court saying (p. 163), "his error was an error of judgment in deciding a question of law which he was obliged to decide, and which was within the scope and limits of his jurisdiction. For such an error he was not liable to the plaintiff whose proper remedy was by an appeal." On the whole, it would seem that this case is directly contrary to Crepps v. Durden (which case, by the way, is not

cited in White v. Morse; in Crepps v. Durden the defendant had equally and in the same sense to decide "a question of law which he was obliged to decide, and which was within the scope and limits of his jurisdiction," that is, the general duty to punish the offences of which the prisoner was charged. The decision of the justice was beyond his jurisdiction as much in one case as the other. Where a justice of the peace has authority to grant attachments in a certain manner, and he acts in a different way, he is liable; People v. Jarrett, 7 Ill. App. 566; see II. Hilliard on Torts, ch. 28, § 5. A judge of a county court in England, acting beyond his territorial jurisdiction, is liable for the consequences of his illegal judgment; Houlden v. Smith, 19 L. J. N. S. 23, 170. Where a justice of the peace had jurisdiction to commit, but also inflicted a penalty, he was held to be liable; Patzack v. Von Gerichten, 10 Mo. App. 424; accord, Phillips v. Thrall, 26 Kas. 780.

In Durden v. Belt, 61 Ga. 545, where a justice acted under a garnishment proceeding which was void, he was held liable.

In McClure v. Hill, 36 Ark. 268, the affidavit in replevin before a justice of the peace did not show that the goods were under \$300 in value, the limit of his jurisdiction. The goods were of a greater value. Held, that both the justice and the officer who executed the attachment were liable. Where a justice of the peace distrained goods of a person not liable to militia fines, he was held to be liable; Wise v. Withers, 3 Cr. 331. It has been held that when a justice gave a judgment against a person under an unconstitutional act of the legislature, and the person suffered thereby, he was liable; Piper v. Pearson, 2 Gray 120; Clark v. May, 2 Gray 410; Sullivan v. Jones, 2 Gray 570. A justice of the peace, or other inferior judicial officer, must pursue his statutory authority with reasonable strictness, or he will be liable; Bigelow v. Stearns, 19 Johns. 39; and see McClure v. Hill, 36 Ark. 268; Hall v. Howd, 10 Conn. 514; Starr v. Scott, 8 Conn. 480; Estopinal v. Peyroux, 37 La. Ann. 477; Brooks v. St. John, 25 Hun 540. Where a justice of the peace issues an attachment against a defendant, and the cause of action is not one of those within the statutory grounds, the justice is liable for the consequences of his action; Wright v. Rouss, 18 Neb. 234. Consult in this connection, Carratt v. Morley, 1 Q. B. 18; Houlden v. Smith, 14 Q. B. 839. A case which seems to have a bearing contrary to the cases cited from 2 Gray, supra, is that of Henke v. McCord, 55 Ia. 378. In that case the defendant issued a warrant by virtue of which liquors were seized, under a void city ordinance. Held, that defendant was not liable.

In Hill v. Sellick, 21 Barb. 207, the defendants, who were school trustees, seem to have acted under a mistake of law as well as fact. They were, however, held not to be liable accord, Weaver v. Devendorf, 3 Den. 117; Linford v. Fitzroy, 13 Q. B. 240; Holcomb v. Cornish, 8 Conn. 375, and other cases, supra. These cases all proceed upon the assumption of previously acquired jurisdiction. Where a justice of the peace, having acquired jurisdiction of one defendant only, causes execution to issue against two, he is liable to the one of whom he did not acquire jurisdiction; Little v. Moore, 1 South. 74. It is well settled also that where a justice or other officer acting judicially, is obliged to pass in his judicial capacity upon some jurisdictional fact, and he decides it in favor of jurisdiction he will not, when acting honestly, be liable for an erroneous decision of such fact. This is subject to the qualification, that he must have some evidence upon which to pass. This is to be carefully distinguished from the case when, as in Crepps v. Durden, his error of decision arises from a mistake as to his legal powers. These cases are also to be distinguished from cases like Hill v. Sellick, supra, where the mistake of law is after the court has acquired full jurisdiction.

The case of Morton v. Crane, 39 Mich. 526, is important in this connection. The plaintiff sued defendant, who was a justice of the peace, in trespass on the case for acts done under an illegal judgment. Among other irregularities or defects in the proceedings, it appeared that the summons was served by the plaintiff in that proceeding. At the return day a person who was not authorized appeared for the defendant, — plaintiff here, and consented to an adjournment. The service, it seems, was void. Judgment was entered against the plaintiff in this suit for non-appearance upon the adjourned day, and under the judgment the plaintiff suffered injury for which he sues. The court (decision by Cooley, J.) held that the defendant was not liable. The court used the following language: "That the action was judicial is unquestionable. A suit had been begun, and it was the duty of the justice to call it and see if the parties appeared. The plaintiff did appear and Hitchcock

answered for the defendant. If he answered with authority, the justice was possessed of the case for the purposes of a trial; but if not, the suit would go down unless a new summons was taken out. A question was therefore presented for the decision of the justice, whether Hitchcock was or was not authorized to appear, and upon this the justice was compelled to pass. No reason can be assigned for holding him responsible for an erroneous decision of this question that would not apply to the case of an error at any stage of the case." The difficulty here seems to lie in holding that the court ever acquired jurisdiction. Justice Cooley expressly says in his decision that if there had been no appearance, the suit would have gone down. The true principle here seems to be that a justice is always protected in any decision, however erroneous, if the facts as presented warranted him in deciding that he had jurisdiction, although he in fact never acquired it. When a justice of the peace acts in good faith upon a complaint setting forth all facts necessary for his action, he is not liable, even though the statements are not in fact true. Morton v. Crane, supra; Lowther v. Radnor, 8 East 113; Pike v. Carter, 3 Bing. 78; Calder v. Halket, 3 Moore's P. C., 28, at p. 78; Miller v. Grice, 2 Rich. (Law) 27.

But the rule is, of course, otherwise, if the complaint does not show jurisdictional facts and they do not in truth exist; Carratt v. Morley, 1 Q. B. 18, and many cases, supra.

(e) Where a justice or other judicial officer of a court of inferior jurisdiction acts maliciously or fraudulently. — Whether or not where a justice of the peace or other judicial officer of an inferior court, acting within his jurisdiction, judicially and not ministerially, is liable for acting erroneously and maliciously, is a question upon which there is an apparent conflict of views. As it is not closely connected with our subject, we shall pass it over with slight comment.

In Maryland such an officer so acting has been held liable; Knell v. Briscoe, 49 Md. 414. So in Iowa, perhaps New York, Louisiana, perhaps South Carolina; Abrams v. Carlisle, 18 S. C. 242; Gowing v. Gowgill, 12 Iowa 495; Tomkins v. Sands, 8 Wend. 462; Estopinal v. Peyroux, 37 La. Ann. 477.

In Massachusetts, Indiana, Iowa, probably Michigan, a contrary view prevails; Pratt v. Gardner, 2 Cush. 63; Kress v. Wagoner, 65 Ind. 106; Wasson v. Mitchell, 18 Iowa 153; Londegan v. Hammer, 30 Iowa 508. *Dietum* of Cooley, J., in Mor-

ton v. Crane, 39 Mich. 526, at p. 530; Wilson v. Mayor, 1 Dev. 595, at p. 599; Anderson v. Park, 57 Iowa 69; Stone v. Graves, 8 Mo. 148; Taylor v. Doremus, 16 N. J. (Law) 473. See, as to general principle, Linford v. Fitzroy, 13 Q. B. 240; Gelen v. Hall, 2 H. & N. 379.

The weight of authority probably is that no action lies against a judicial officer, having jurisdiction, when acting judicially, even though he acts erroneously and with malice. A similar rule applies to grand jurors; Turpen v. Booth, 56 Cal. 65. Neglect by a justice to perform his official duty as to a ministerial act may render him liable; Carpenter v. Warner, 138 Ohio St. 416.

Many of the cases which hold that a judicial officer is liable for malicious action may be explained on the ground that, in the view of the court, the act complained of, e.g., illegally refusing bail, was a ministerial and not a judicial act.

III.

Liability of Ministerial Officers who act under Void Proceedings.

— As this is not closely connected with our subject, it will be treated briefly. It seems, on the whole, however, to be sufficiently germane to the subject for mention.

As a rule, an officer acting under the warrant of a court, where the warrant is regular upon its face, is not liable, even if the judgment upon which the warrant is founded is erroneous or even void; Levy v. Moylan, 10 C. B. 189; McClure v. Hill, 36 Ark. 268; Baird v. Campbell, 4 W. & S. 191; Mills v. Martin, 19 Johns. 7; Scott v. Rucker, 19 Mo. App. 587; Elsmore v. Longfellow, 76 Me. 128; Collins v. Mann, 15 W. Va. 171; Clark v. Bowe, 60 How. Pr. 98; Chipstead v. Porter, 63 Ga. 220; Archibeque v. Miera, 1 New Mexico 419; Lake v. Biller, 1 Ld. Ray. 733; Shipman v. Clark, 4 Den. 446; Foster v. Pettibone, 20 Barb. 350; Hallett v. Byrt, Carthew 380; Simpson v. Reynolds, 14 Barb. 506; Andrews v. Maris, 1 Q. B. 3; Webb v. Batchelor, 1 Vent. 273; Chegnay v. Jenkins, 1 Seld. 376; Patchin v. Ritter, 27 Barb. 34; Wood v. Davis, 34 N. H. 328; Wood v. Alleghany City, 18 Pa. St. 55; Cody v. Quinn, 6 Ired. (Law) 191; Hecker v. Jarrett, 3 Brim. 404; Billings v. Russell, 23 Pa. St. 189; People v. Warren, 5 Hill 440; People v. Cooper, 13 Wend. 379; Webber v. Gay, 24 Wend. 485; Watson v. Watson, 9 Conn. 141; State v. Weed, 21 N. H. 262; Champaign County Bank v. Smith, 7 Ohio St. 42; Sprague v. Richard, 1 Wis. 457; Henderson v. Brown, 1 Carr. 92; Stoddard v. Tarbell, 20 Vt. 321; Darling v. Brown, 10 Vt. 148; Savacool v. Boughton, 5 Wend. 170; Hecker v. Jarrett, 3 Brim. 404; Moore v. Houston, 3 S. & R. 169, sem.; Robinson v. Brennan, 90 N. Y. 208; Barr v. Boyles, 96 Pa. St. 31; Norcross v. Nunan, 61 Cal. 640; Philipps v. Spotts, 14 Neb. 139; Collins v. Mann, 15 W. Va. 171. But see Martyn v. Podger, 5 Burr. 2631; Daman v. Bryant, 2 Pick. 411; Hill v. Bateman, 2 Str. 710; Howard v. Gosset, 10 Q. B. 359; Morse v. James, Wills 122; Tobin v. Addison, 2 Strobh. 3; Ford v. Babcock, 1 Den. 158; Barrett v. Crane, 16 Vt. 246; Cable v. Cooper, 15 Johns. 152; Brown v. Compton, 8 T. R. 424; case of the Marshalsea, 10 Coke 68a.

It is otherwise if the warrant shows upon its face that the judgment upon which it is founded was in a proceeding coram non judice; Hall v. Howd, 10 Conn. 514; Starr v. Scott, 8 Conn. 480; Beazeley v. Dunn, 8 Rich. 345; Sagendorph v. Shult, 41 Barb. 102; Carratt v. Morley, 1 Q. B. 18; Mitchell v. Harmony, 13 How. 115; Gruman v. Raymond, 1 Conn. 39; Sanford v. Nichols, 13 Mass. 286; Bonaker v. Evans, 16 Q. B. 162; Clarke v. Bond, 7 Baxter 288; Kentzler v. Chicago, &c., Ry., 47 Wis. 641.

In Fisher v. McGin, 1 Gray 1, it was held that an officer executing a warrant under a judgment of an inferior court, which judgment was founded upon an unconstitutional statute, was liable; Kelly v. Bemis, 4 Gray 83; Henke v. McCord, 55 Ia. 378, semble contra.

IV.

Liability of Parties and Attorneys who instigate Proceedings which are Invalid.

The remark which applied to (III.) supra, regarding connection with our subject applies here. The subject will be treated briefly and without consideration of the finer distinctions presented by the cases. To avoid repetition, the numerous cases which involve the subject under this head, and which have been cited above, will be cited here only so far as seems necessary to make the subject clear. As a general rule, neither a party or attorney is liable for the consequences of an illegal proceeding

where his acts do not amount to a malicious prosecution, and where he takes no active and positive part in carrying out the process. When a person applies to a court and properly states the facts, and the court takes some action under which another person receives injury, the person applying to the court is not, in general, liable, where he takes no active part, even if the proceeding is without authority and void; West v. Smallwood, 3 M. & W. 418. Consult Painter v. Liverpool Gas Co., 3 Ad. & E. 433; Cohen v. Morgan, 6 Dowl. & Ry. 8; Barker v. Stetson, 7 Gray 53; Baid v. Campbell, 4 W. & S. 191; Field v. Anderson, 103 Ill. 403; Carratt v. Morely, 1 Ad. & El. N. S. 18; Bigelow on Torts, 3d. ed. 128; Cooper v. Harding, 7 Q. B. 928; Peckham v. Tomlinson, 6 Barb. 253; Williams v. Smith, 14 C. B. N. S. 596; Smith v. Sydney, L. R. 5 Q. B. 203; Codrington v. Lloyd, 8 Ad. & El. 449; Devo v. Van Valkenburgh, 5 Hill 242. These numerous cases in accord among those cited above.

In Curry v. Pringle, 11 Johns. 444, a defendant was held liable when he had applied to a magistrate and procured the plaintiff's arrest without due cause shown. See case of the Marshalsea, 10 Coke 68a.

Where the attorney or party takes active part in the execution of a writ founded upon a proceeding which is coram non judice, such officer or party may be held liable; Barker v. Braham, 2 Wm. Bl. 366; Deal v. Bogne, 20 Pa. St. 228; Emery v. Hapgood, 7 Gray 55; West v. Smallwood, 3 M. & W. 418; Parsons v. Loyd, 3 Wils. 341; Bryant v. Chilton, 1 M. & W. 408; Codrington v. Lloyd, 8 Ad. & El. 449; Green v. Elgie, 5 Ad. & El. N. S. 99; Benham v. Vernon, 3 Cent. Rep. 276.

LICKBARROW v. MASON.

IN B. R. CAM. SCACC. ET DOM. PROC.

[REPORTED 2 T. R. 63; 1 H. BL. 357; AND 6 EAST, 21.]

The vendee of goods may by assignment of the bills of lading to a bonâ fide transferee, defeat the vendor's right to stop them in transitu, in case of the vendee's insolvency.

The consignor may stop goods in transitu before they get into the hands of the consignee, in case of the insolvency of the consignee; but, if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person.

Trover for a cargo of corn. Plea, the general issue. plaintiffs, at the trial before Buller, J., at the Guildhall sittings after Easter Term, gave in evidence that Turing and Son, merchants at Middleburg, in the province of Zealand, on the 22nd of July, 1786, shipped the goods in question on board the Endeavour for Liverpool, by the order and directions and on the account of Freeman, of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form unto orders or assigns; two of which were indorsed by Turing and Son, in blank, and sent, on the 22nd of July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son; and the remaining one was kept by Holmes. On the 25th of July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to 4771, in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of 520l. on the plaintiffs, who accepted them, and have since duly paid them. The plaintiffs are creditors of Freeman to the amount of 5421. On the 15th of August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son, hearing of Freeman's bankruptcy on the 21st of August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorising them to obtain possession of the goods on account of, and for the use and benefit of, Turing and Son, which the defendants received on the 28th of August, 1786. On the arrival of the vessel with the goods at Liverpool, on the 28th of August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them and for and on account of Turing and Son. The defendants sold the goods on account of Turing and Son, the proceeds whereof amounted to 5571. Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs nor Freeman have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

This was argued in last Trinity Term by *Erskine* in support of the demurrer, and *Manly* against it; and again, on this day, by *Shepherd*, in support of the demurrer, and *Bearcroft contrâ*.

Shepherd (a), after observing that, as the defendants were the agents of Turing and Son, the general question was to be considered as between the consignor and the indorsee of the

the subject, the former argument is omitted.

⁽a) As the second argument, with the judgment of the court, comprehended everything that was said upon

bill of lading, contended, first, that, as between the vendor and vendee of goods, the former has a right to stop the goods in transitu, if the latter become insolvent before the delivery of them. And, secondly, that such right cannot be divested by the act of the vendee's indorsing over the bill of lading to a third person. The first question has been so repeatedly determined, that it is scarcely necessary to cite any authorities in support of it. (The plaintiff's counsel admitted the position.) Then, in order to determine the second, it is material to consider the nature of a bill of lading. A bill of lading cannot by any means be construed into a contract on the part of the consignor to deliver the goods mentioned in it to the consignee; it is only an undertaking by the captain to deliver the goods to the order of the shipper. As between the consignor and consignee, it is a bare authority to the captain to deliver, and to the consignce to receive them. That this is the true nature of a bill of lading appears from all the writers upon mercantile law, as Molloy, Postlethwayte, and Beawes. If it be any sort of instrument, it must be contended to amount to a contract by the consignor to deliver the goods to the consignee; but no such contract arises upon it, because the consignor is not even a party to it; and no action could be framed upon it against the consignor. Then, if it be only a bare authority to the one to carry, and to the other to receive the goods, the consignee cannot transfer a greater right than he has; neither can the right of the consignor be divested by the act of the consignee. If a bill of lading be a negotiable instrument, and convey an indefeasible property in the goods, it must be so by the custom of merchants; but such custom is not to be found in any of the books treating upon the subject. There are cases which establish a contrary doctrine, in which the courts have held that the rights of the assignees are the same as the rights of the original consignees. It cannot, indeed be disputed but that, as between the consignee and the indorsee, the indorsement of a bill of lading is a complete transfer of the property which the consignee has in it; but the cases go no further. The case of Snee and Prescot (a) is precisely similar to the present. There the bill of lading was indorsed in blank, and afterwards indorsed over by the consignee to his assignees: those assignees were some of

the defendants in that suit, and they stood in the same situation with the present plaintiffs. In that case, before the goods arrived, and after the indorsement of the bill of lading by the consignee, the consignee having become a bankrupt, the goods were stopped in transitu by order of the consignor, by an indorsement of the bill of lading, which was left with him, to another of the defendants; there Lord Hardwicke decreed that the indorsement did not absolutely transfer the property in the goods in the event of the consignee's becoming a bankrupt before the arrival of the goods; that as the goods had been stopped in transitu, by order of the consignor, he had a right to detain them till the sum which he was to advance to the consignee on account of them was paid; and that the surplus arising from the produce of the goods should be paid to the indorsees of the consignee. Now, unless Lord Hardwicke had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods, he would have decreed that the indorsees should have been first paid the money which they had advanced upon the credit of the bill of lading, and then that the surplus should have been paid to the consignor; but instead of that he gave a priority to the consignor. This doctrine is not only laid down in a court of equity, but confirmed in a court of law in the case of Savignae and Cuff (a), where the same question was tried between the same parties as at present. There Salvetti, a merchant in Italy, consigned a quantity of skins to Lingham, residing in London, and sent him a bill of lading indorsed in blank. Lingham, the consignee, indorsed it to Savignae for a valuable consideration, at the invoice price, showing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to Cuff, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did; and the action was brought against him by the indorsee of the consignee to recover the value of the goods. Wallace, Solicitor-General, there argued that by the indorsement of the bill of lading the property was transferred. But Lord Mansfield was of opinion that the con-

⁽a) Sittings at Guildhall, cor. Lord Mansfield, Tr. 1778.

signor had a right to stop the goods in transitu in the case of the insolvency of the consignee, and that the plaintiff, standing in the situation with the original consignee, had lost his lien. Lord Mansfield was first of opinion, that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground. But in that case, as the consignor had in point of fact received 150%, from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled, under those circumstances, to retain all the goods consigned, deducting only the sum which he had actually received for part. Both these cases establish the construction of the bill of lading contended for: and it is to be observed that the verdict in the latter was acquiesced in. And indeed to construe it otherwise would be opening a great door to fraud, and would be placing the indorsee of a consignee of a bill of lading in a better situation than the consignee himself in case of his insolvency. Suppose the consignee assign over to a third person, who becomes insolvent before the delivery of the goods, such assignee would then, notwithstanding his insolvency, have a right to get the goods into his possession; for if the act of indorsement absolutely divests the property out of the consignor, he can never afterwards get possession of the goods again; or else this consequence would follow, that vendor would have a right to seize the goods in transitu till the indorsement, by which his right would be divested, and that by the act of insolvency of the indorsee it would be revested. This has never been considered to be the same sort of instrument as a bill of exchange; they are not assimilated to each other in any treatise upon the subject: nay, bills of exchange are said to be sui juris. In their nature they are different: a bill of exchange always imports to be for value received; but the very reverse is the case with a bill of lading. For in few, if any, instances, is the consignor paid for his goods till delivery; and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading. As to the case of Wright and Campbell (a), which may be cited on the other side, it will perhaps be said that the court awarded a new trial only on the ground of fraud; but non constat that, if there had been no suspicion of fraud, a new trial would not have been granted. So that the law cannot be considered to have been decided in that case; for when a new trial is moved for, if the facts warrant it, the court awards a new trial without going into the law arising upon those facts. In such cases the law is still left open to be considered on a different finding; since it would be nugatory to determine the point of law, which may not perhaps be applicable to the facts when found. At the most, there is only an inference of law to be drawn from that case, which is not sufficient to overturn established principles. Besides, this case is distinguishable from that; for there it appeared that the consignee was the factor of the consignor, and as such might bind his principal by a sale.

Bearcroft, contrà. - The question is whether the bona fide indorsement for a valuable consideration of a bill of lading to a third person is not an absolute transfer of the whole property? This question is of infinite importance to the mercantile world, and has never yet been put in a way to receive a solemn decision in a court of law. For at most it has only been considered in a court of equity upon equitable principles, or at Nisi Prius in a case the correct state of which is to be doubted. The form of the bill of lading is material to be attended to in determining this case; it is, that the goods are to be delivered "to order or to assigns"; therefore, on the very face of the instrument, there is an authority to the captain to deliver them to the consignee or to his assigns; and the question here is, who are his assigns? As between the consignor and consignee the rule contended for is not now to be disputed, since it has been confirmed by so many authorities; though, perhaps, it were much to be wished that it had never been established: but there will be danger in extending it farther. With respect to the case of Snee and Prescot, when it is considered who were the parties to the cause, in what court, and upon what principles it was decided, it will not be found sufficient to determine the present case. The actors, the plaintiffs, were not the innocent purchasers of a bill of lading; they were the assignees of a bankrupt, and prayed by their bill to get possession of the goods, notwithstanding they had not paid for them. But this is a case between the consignor and third persons who have paid a valuable consideration for the goods; that case was

likewise in a court of equity, where the leading principle is, that he who seeks equity, must first do what is equitable; there too the decision was founded in some measure, on the custom of the Leghorn trade, and the construction of the statute relating to mutual credit; so that there were united a number of circumstances which, taken altogether, induced Lord Hardwicke's decree, and which do not exist in the present case. And it is to be remarked that Lord Hardwicke, thinking it a harsh demand against the consignors, said, "he would lay hold on anything to save the advantage" which the consignors had, by regaining the possession of the goods before they got into the hands of the indorsees of the consignee. Then, as to the case of Savignac v. Cuff, that had not even the authority of a Nisi Prius determination. Lord Mansfield gave no opinion upon the question; for though he said there was no doubt but that, as between the vendor and the vendee, the former might seize the goods in transitu, if the latter became insolvent before they were delivered, yet there he stopped: so that the inclination of his mind may be presumed to have been against extending the rule. And, after all, the whole circumstance of that case were left to the consideration of a jury. Since Lord Raymond's time (a) it has been taken to be clear and established law that a general indorsement of a bill of lading does transfer the property. And Holt, C. J., then said, "that a consignee of a bill of lading has such a property that he may assign it over." It has now been contended that the right of the consignor ought not to be divested by the act of the consignee: but it is not by the act of the consignee alone; for the consignor has by his own act enabled the consignee to defeat his right. If he had been desirous of restraining the negotiability of the bill of lading, instead of making a general indorsement, he should have made a special indorsement to his own use. And then the holder of the bill of lading would have been considered as a trustee for the consignor. The custom of merchants has established that the delivery of a bill of lading transfers the whole property, Evans v. Martlett, 1 Lord Raym. 271; Wright v. Campbell, 4 Burr. 2046; and Caldwell v. Ball, ante, 1 vol. [T. R. 7 205 (b). Then it has been said, that a bill of lading is not transferable like a bill of exchange: but the custom of mer-

⁽a) Lord Raym. 271.

chants has made that transferable which in its nature perhaps is not so; and the cases above referred to decide that point. Though a new trial in the case of Wright v. Campbell was granted on a suspicion of fraud, and the law was not expressly adjudged; yet from what was said by the Court it may be collected that no new trial would have been awarded, if no fraud had existed; and the opinion of Lord Mansfield, as far as it goes, is expressly in point. But, above all arguments, public convenience ought to have a considerable influence in the decision of this question. By the constant course and the universal consent and opinion of merchants, bills of lading are negotiable; it is highly convenient to trade that they should be so; and if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped: besides, it will be a hardship on an innocent vendee.

Shepherd, in reply. - Though there may be some hardship on the vendee if he be to suffer, yet the hardship would be equally great on the vendor, who would by a decision against him be compelled to deliver up the possession of his goods, though at the time of the delivery he knew that he should not receive any consideration for them. But convenience requires that, if one of these two innocent persons must suffer, the loss should be sustained by the consignee. For when a vendor consigns his goods, he knows that by the general law he has a right to stop them in transitu, if the consignee become insolvent before delivery. But when an indorsee takes an assignment of a bill of lading, he takes it with the knowledge of, and subject to, that general right which the vendor has. Though the case of Snee v. Prescot was determined in a court of equity, yet that court could not alter the effect and nature of a legal instrument; which it must have done in that case if the right of an indorsee is to be preferred to the consignor. Suppose A. sends a bill of lading of goods to B., and the goods themselves are in fact never sent out of his possession; if the indorsement of the bill of lading can be said to transfer the property, the indorsee would have a right to recover the goods as against the original consignor, who had never parted with the possession of them. So that the rule contended for would not only divest the right which the consignor has to seize the goods in transitu, but would also compel him to part with his goods, without receiving any consideration, although he had never relinquished

his possession. The meaning of the dictum of Lord *Holt*, in *Evans* v. *Martlett*, is only that the consignee may assign over that right which he has. The case of *Caldwell* v. *Ball* was merely a question between two solvent indorsees, both of whom had an equitable title; and that case only decided that he who first got possession of one of the bills of lading was entitled to the goods; and there, too, the Court determined in favour of him who had the possession.

Ashurst, J. - As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it (a). If that be so, it will be a strong and leading clue to the decision of the present case. It has been argued, that it would be very hard on a consignor, who had received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true: but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he delivers the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the meantime, the vendor may stop the goods in transitu. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of ex-

⁽a) [See Swan v. The British Australasian Co., 7 H. & N. 603; 31 L. J. Exch. 425, S. C.; affirmed in error, 32 L. J. 280; Foster v. Green, 7 H. &

N. 881; Udell v. Atherton, 7 H. & N.
 786; Collingwood v. Berkeley, 15 C.
 B. N. S. 145; Babcock v. Lawson, 4
 Q. B. D. at p. 400.

change. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot between the drawer and the indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into; though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person; for when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord Mansfield in the case of Wright v. Campbell goes the full length of this doctrine: "If the goods be bona fide sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the statute 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold bona fide, and by the owner's own authority." Now in this case the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be divested by any subsequent circumstances.

Buller, J.— This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the several authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding my judgment upon it, but because I would not have it supposed in any future case

that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of lading: it appears by the books treating on this subject, that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself, as a testimony against the captain in case of any loose dealing. Now, if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, "in witness the master hath affirmed to four bills of lading, all of this tenor and date." But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? He had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question: and I make the question even more general than was made at the bar, namely, whether a bill of lading is by law a transfer of the property (a). This question has been argued upon authorities: and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is that of Snee v. Prescot. Now, sitting in a court of law, I should think it quite sufficient to say, that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who seeks equity must first do equity. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord Hardwicke has,

⁽a) [See on this question Sewell v. Burdick, 10 App. Ca.]

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with his usual caution, enumerated every circumstance which existed in the case: and, indeed, he has been so particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord Hardwicke thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in Snee v. Prescot that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases were thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country. I hope to show, before I have finished my judgment, that there has been no inconsistency in any of his determinations: but if there had, if I could not reconcile an opinion which he had delivered at Nisi Prius with his judgment in this court, I should not hesitate to adopt the latter in preference to the former; and it is but just to say, that no judge ever sat here more ready than he was to correct an opinion suddenly given at Nisi Prius. First, as to the case of Wright v. Campbell, that was a very solemn opinion delivered in this court. In my opinion that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord Mansfield has stated so extremely clear that they cannot be mistaken: The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and the assignee of the factor with notice; thirdly, as between the same parties without notice; and, fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that the case of Wright v. Campbell was decided by the judge at Nisi Prius upon the ground that the bill of lading transferred the whole property at law: and when it came before this court on a motion for a new trial, Lord Mansfield confirmed that opinion: but a new trial was granted on a suspicion of fraud; therefore it is fair to infer, that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of Wright v. Campbell, which I took in court, Lord Mansfield said, that since the case in Lord Raymond, it had always been held that the delivery of a bill of lading transferred the property at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is that of Savignac v. Cuff, the note of which is too loose to be depended upon: but there is a circumstance in that case which might afford ample ground for the decision; for I cannot suppose that Lord Mansfield had forgotten the doctrine which he laid down in this court in Wright v. Campbell. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods: but in Savignac v. Cuff, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and if it appeared to him that Selvetti had not been paid for the goods, that might have been a ground for the determination. The case of Hunter v. Beal (a) does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With respect to the case of Stokes v. La Riviere (b), perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case, therefore, does not impeach the doctrine

⁽a) Sittings after Trin. 1785, at Guild- (b) Hil. 25 G. 3. hall, before Lord Mansheld, C. J.

laid down in Wright v. Campbell. It has been argued at the bar, that it is impossible for the holder of a bill of lading to bring an action on it against the consignor; perhaps that argument is well founded: no special action on the bill of lading has ever been brought (a); for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is a proper form of action. If an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed, that all the cases upon the subject - Evans v. Martlett, Wright v. Campbell, and Caldwell v. Ball, and the universal understanding of mankind - preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of Snee v. Prescot; for if a man has bought goods and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that is a bad argument in a court of law; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain, of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the Court.

⁽a) [See now as to the right to sue by statute, post, in notâ.]

Grose, J. - After this case had been so elaborately spoken to by my brethren, it is not necessary for me to enter fully into the question, as I am of the same opinion with them. But I think that the importance of the subject requires me to state the general grounds of my opinion. I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does. With respect to the question as between the original consignor and consignee, it is now the clear, known, and established law that the consignor may seize the goods in transitu, if the consignee become insolvent before the delivery of them. But that was not always the law. The first case of that sort was that of Wiseman v. Vandeputt in Chancery (a), when, on the first hearing, the Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees; and it was then determined in a court of law that it did; but the Court of Equity thought it right to interpose and give relief: and since that time it has always been considered, as between the original parties, that the consignor may seize the goods before they are actually delivered to the consignee in case of the insolvency of the consignee. But this is a question between the consignor and the assignee of the consignee, who do not stand in the same situation as the original parties. A bill of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and on the faith of that, money is advanced. The first case that I find where an attempt was made to introduce the same law between the consignor and the indorsee of the consignee, is that of Snee v. Prescot; but as my brother Buller has already made so many observations on that case, it would be but repetition in me to go over them again, as I entirely agree with him in them all, as well as in those which he made on the other cases. Therefore I am of opinion that there should be judgment for the plaintiff.

Judgment for the plaintiff (b).

(a) 2 Vern. 203.

the record being afterwards removed into the House of Lords, a venire de novo was awarded in June, 1793. Vide post, p. 794.

⁽b) This judgment was afterwards reversed in the Exchequer Chamber, vide Mason v. Lickbarrow, infra. But

MASON AND OTHERS v. LICKBARROW AND OTHERS, IN THE EX-CHEQUER CHAMBER, IN ERROR.

The defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that court was then delivered by (a)

Lord Loughborough.— This case comes before the court on a demurrer to the evidence; the general question, therefore, is, whether the facts offered in evidence by the plaintiffs in the action are sufficient to warrant a verdict in their favour?

The facts are shortly these: On the 22nd of July, 1786, Messrs. Turing shipped on board the ship Endeavour, of which Holmes was master, at Middleburg, to be carried to Liverpool, a cargo of goods by the order and directions and on the account of Freeman, of Rotterdam, for which, of the same date, bills of lading were signed on behalf of the master, to deliver the goods at Liverpool, specified to be shipped by Turings to order or to assigns. On the same 22nd of July, two of the bills of lading, indorsed in blank by Turings, were transmitted by them, together with an invoice of the goods, to Freeman at Rotterdam, and were duly received by him, that is, in the course of post, one of the bills being retained by Turings. I take no notice of there being four bills of lading, because on that circumstance I lay no stress. On the 25th of July, bills of exchange for a sum of 4771, being the price of the goods, were drawn by Turings, and accepted by Freeman at Rotterdam; and Freeman on the same day transmitted to the plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received from Turings, in order that the goods might be sold by them on his account; and of the same date drew upon them bills to the amount of 520%, which were duly accepted, and have since been paid by them; and for which they have never been reimbursed by Freeman, who became a bankrupt on the 15th of August following. The bills accepted by Freeman,

(a) Held in Cam. Scace, that where the consignee of goods becomes insolvent, the consignor may stop them in transitu before the consignee gains possession. In such cases also the consignor may stop the goods in transitu, though the consignee assign

the bills of lading to a third person for a valuable consideration; the right of the consignor not being divested by the assignment. But this judgment was reversed, and the latter point is now settled otherwise. for the price of the goods shipped by Turings, had not become due on the 15th of August, but on notice of his bankruptey they sent the bill of lading which remained in their custody to the defendants at *Liverpool*, with a special indorsement to deliver to them and no other: which the defendants received on the 28th of August, 1786, together with the invoice of the goods and a power of attorney. The ship arrived at *Liverpool* on the 28th of August, and the goods were delivered by the master, on account of Turings, to the defendants, who, on demand and tender of freight, refused to deliver the same to the plaintiffs.

The defendants, in this case, are not stakeholders, but they are in effect the same as Turings, and the possession they have got is the possession of Turings. The plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claim of him or his assignees. If they have acquired a legal right, they have acquired it honestly; and if they have trusted to a bad title, they are innocent sufferers. The question then is, whether the plaintiffs have a superior legal title to that right which, on principles of natural justice, the original owner of the goods not paid for has to maintain that possession of them, which he actually holds at the time of the demand?

The argument on the part of the plaintiffs, asserts that the indorsement of the bill of lading by the Turings is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt: that Freeman could assign over that property, and that by delivery of the bill of lading to the plaintiffs for a valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the defendant it is argued, that the bill of lading is not in its nature a negotiable instrument; that it more resembles a chose in action; that the indorsement of it is not an assignment that conveys any interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and therefore it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these

propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading should be clearly defined, I think it necessary to state my ideas of its nature and effect:—

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment; 2 Lord Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master: but the holder of the bill, if it came into his hands casually without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master; and in this respect, I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? A right to receive the goods and to discharge the ship-master, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is primâ facie evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a factor. Mere possession, without a just title, gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a chose in action, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an

assignment of the thing itself, which ought to be delivered on demand, and the right to sue if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271 was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract: and I assent to the dictum, that he might assign over his right. But the question remains, What right passes by the first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption, and the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of the trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration without notice, is not affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases (a) that the received opinion of merchants was

⁽a) Snee v. Prescot, 1 Atk. 245; Fearon v. Bowers, post.

against their being so negotiable. And unless there was a clear, established general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law would lose its credit with the rest of the commercial world. For the immediate consequence would be to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce: for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which the goods are sold or assigned? In the case of (a) Hartop v. Houre, jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn, the goods of his own consignor, Patterson v. Tash, 2 Str. 1178. The person, therefore, who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet, in this case the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing, that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him: a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others.

⁽a) 2 Str. 1187; 1 Wils. 8,

The conclusions which follow from this reasoning, if it be just, are — 1st. That an order to direct the delivery of goods indorsed on a bill of lading is not equivalent, nor even analogous, to the assignment of an order to pay money by the indorsement of a bill of exchange. 2ndly. That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but, as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3rdly. That it is, therefore, not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer, that the mere indorsement can in no case convey an absolute property. It may, however, be said, that admitting an indorsement of a bill of lading does not in all cases import a transfer of the property of the goods consigned, yet where the goods, when delivered, would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of the man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for may retain the possession

against the vendee; not by aid of any equity, but on grounds of law. Our oldest books (a) consider the payment of the price (day not being given (b)) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract, for the non-delivery. Snee v. Prescot, 1 Atk. 245. The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods in transitu. The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at Guildhall, after the last Trinity Term, it appeared in evidence, that one Bowering had brought a cask of Indigo of Verrulez and Co. at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez, having information of Bowering's insolvency before the ship sailed from the Texel, summoned Tulloh the ship-master before the court at Amsterdam, who ordered him to sign other bills of lading, to the order of

⁽a) See Hob. 41, and the Year Book there cited.

⁽b) [See Martindale v. Smith, 1 Q. B. 389.]

Verrulez. Upon the arrival of the ship in London, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves particular attention, for the judges of the court at Amsterdam are merchants of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. Snee v. Prescot, though in a court of equity, is professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of Fearon v. Bowers (a),

(a) Fearon v. Bowers, Guildhall, March 28, 1753, coram Lee, C. J.

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one Hall, of Salisbury, had written to Askell and Co., merchants at Malaga, to send him 20 butts of olive oil, which Askell accordingly bought, and shipped on board the ship Tavistock, of which the defendant was commander, who signed three bills of lading acknowledging the receipt of the goods, to be delivered to the order of the shipper. In the bills was the usual clause - that one being performed, the other two should be

The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading, to Hall, indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones, his partner in England, a bill of exchange drawn on Hall for the amount of the price of the oil; and also another of the bills of lading indorsed by Askell to deliver the contents to Jones. The bill of exchange was presented to Hall, but not being paid by him it was returned protested; whereupon Jones, on the 1st of September, 1752

(a day or two after the ship arrived), applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered, the plaintiff, on the 3rd of September, produced the bill of lading sent to Hall, with an indorsement thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall 2001. — Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lad-

For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over; Evans v. Martlett, 1 Lord Raym. 271. There it is laid down, if goods are by bill of lading consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost: but if the bill be special to deliver to

tried before Lord Chief Justice Lee, is a case at law, and it is to the same effect as Snee v. Prescot. So also is the case of the Assignees of Burghall v. Howard (a), before Lord

A. for the use of B., B. ought to bring the action; but if the bill be general, and the invoice only shows they are upon the account of B., A. ought to bring the action, for the property is in him, and B. has only a trust; per totam curiam. Holt, C. J., said the consignee of a bill of lading has such a property that he may assign it over; and Shower said, it had been adjudged so in the Exchequer. It has been further insisted, that the plaintiff had advanced the 2001, on the credit of the bill of lading, in the course of trade, and no objection was made that the oils had not been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange, which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides. and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor, if not paid for the goods, had a right, by any means that he could, to stop their coming to the hands of the consignee till paid for. One of the witnesses said, he had a like case before the Chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way, so as he did not steal

It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either with a receipt on the

bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, C. J., in summing up the evidence, said that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement: that the invoice strengthens that right by showing a farther intention to transfer the property. But it appeared in this case, that Jones had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods. And it appeared by the evidence, that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did. [Accord, as to discharge of the master by delivery under either bill, The Tigress, Brown & Lushington, Adm. Ca. 38; 32 L. J. Adm. 97. But that Fearon v. Bowers cannot be supported to its full extent in protecting a master who delivers to one indorsee with notice that another part of the bill of lading is outstanding with another indorsee, see Glyn v. East and West India Dock Co., 7 App. Ca. 591.

(a) Assignees of Burghall, a bankrupt, v. Howard. At Guildhall sittings after Hil. 32 G. 2, coram Lord Mansfield. One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard, the defendant, was master, who signed a bill of lading to deliver it in good condition to Burg-

Mansfield. The right of the consignor to stop the goods is here considered as a legal right. It will make no difference in the case whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended that the right ceases as against a person claiming under the consignee for a valuable consideration, and without notice that the price is unpaid. To support this position, it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith, and unconscionable. If the consignor had no legal title, the question between him and the bonâ fide purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods in transitu as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated as a mere equitable claim in cases between him and the consignee. To examine the force of this assertion, it is necessary to take a review of the several determinations.

The first is the case of Wright v. Campbell, 4 Burr. 2046, on

hall in *London*. The ship arrived in the *Thames*, but Burghall having become a bankrupt, the defendant was ordered, on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as carrier. Lord

Mansfield was of opinion that the plaintiff's had no foundation to recover; and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. The plaintiffs were nonsuited.

which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at Nisi Prins, on the argument of which the Court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it an opinion of Lord Mansheld, that the right of the consignor to stop the goods cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes, 1st, that as against the factor, the owner may retain the goods; 2ndly, that a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3rdly, that a band fide purchaser from the factor shall have a right to the delivery of the goods, because they were sold bond fide, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the order of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the court, if the plaintiffs in the action could maintain, that Turing and Co. had sold to them by the intervention of Freeman, and were therefore bound ex contractu to deliver the goods. Lord Mansfield's opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favor of the consignor, as delivered in two cases at Visi Prius; (a) Savignac v. Cuff in 1778, and (b) Stokes v. La Riviere in 1785.

Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on the authority. The case of (a) Caldwell v. Ball is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of (b) Hibbert v. Carter was also cited on the same side, not having decided any question upon the consignor's right to stop the goods, but as establishing a position that by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and, undoubtedly, if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just: for the property of the goods, and the risk would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of *England*, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. The case, therefore, has no application to the present question. from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods in transitu, before the case now brought before this court. When a point in law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion upon loose reports of incidental arguments. The rule, therefore, which the court is to lay down

⁽a) 1 Term Rep. B. R. 205.

⁽b) 1 Term Rep. B. R. 745.

in this case, will have the effect, not to disturb, but to settle, the notions of the commercial part of this country, on a point of very great importance, as it regards the security and good faith of their transactions. For these reasons we think the judgment of the Court of King's Bench ought to be reversed.

The following account of the further proceedings in this case is given by Mr. East, in a note to his Reports, Vol. 2, p. 19.

This case first came on upon a demurrer to evidence, on which there was judgment for the plaintiff; this court holding, that though the vendor of the goods might, as between himself and the vendee, stop them in transitu to the latter, in case of his insolvency, not having paid for them; yet that if the vendee, having in his possession the bill of lading indorsed in blank by the vendor, before such stopping in transitu, indorse and deliver it to a third person for a valuable consideration and without notice of the non-payment, the right of the vendor to stop in transitu is thereby divested as against such bona fide holder of the bill. This judgment was reversed upon a writ of error in the Exchequer Chamber, where it was considered that a bill of lading was not a negotiable instrument, the indorsement of which passed the property proprio vigore, like the indorsement of a bill of exchange; though to some purposes it was assignable by indorsement, so as to operate as a discharge to the captain who made a delivery bonâ fide to the assignee. 1 H. Black. 357. The latter judgment was in its turn reversed in the House of Lords in T. 33 Geo. 3, and a venire facias de novo directed to be awarded by B. R. 5 Term Rep. 367, and 2 H. Black. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record MS. The very elaborate opinion delivered by Mr. Justice Buller, upon the principal question before the House, a copy of which he afterwards permitted me to take, I shall here subjoin, as it contains the most comprehensive view of the whole of this subject which is anywhere to be found. A venire facias de novo having been accordingly awarded by B. R., a special verdict was found upon the second trial, containing in substance the same facts as before; (a)with this addition, that the jury found, that by the custom of mer-

⁽a) [See as to the effect of this finding, Sewell v. Burdick, 10 App. Ca. 74.]

chants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person; and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person: and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper. On this special verdict, the court of B. R., understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it; merely saying, that they still retained the opinion delivered upon the former case, and gave judgment for the plaintiffs. 5 Term Rep. 683.

LICKBARROW AND ANOTHER v. MASON AND OTHERS, IN ERROR. — DOM PROC. 1793.

Buller, J. — Before I consider what is the law arising on this case, I shall endeavour to ascertain what the case itself is (a). It appears that the two bills of lading were endorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at Liverpool, be taken possession of, and sold by the plaintiffs, on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the words, "to be so sold by the plaintiffs on Freeman's account," make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange, the effect of a blank indorsement is too universally known to be doubted; and, therefore, on that head I shall only mention the case of Russel v. Langstaffe, Dougl. 496, where a man indorsed his name on copper-

⁽a) [See as to this opinion per burn in Sewell v. Burdick, 10 App. Ca. Field, J., in Burdick v. Sewell, 10 Q. at p. 98.]

B. D. at p. 371, and per Lord Black-

plate checks, made in the form of promissory notes, but in blank, i.e., without any sum, date, or time of payment: and the court held, that the indorsement on a blank note is a letter of credit for an indefinite sum; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your lordships' bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a particular person by name. In the case of Snee y. Prescot, Lord Hardwicke thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up; and upon that ground part of his decree was founded. But that I conceive to be a clear mistake. And it appears from the case of Sarignac v. Cuff, (of which case I know nothing but from what has been quoted by the counsel, and that case having occurred before the unfortunate year 1780 (a), no further account can be obtained,) though Lord Mansfield at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In Solomons v. Nyssen, Mich. 1788, 2 Term Rep. 674, the bill of lading was to order or assigns, and the indorsement in blank; but the court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, what difference do the words "to be sold by the plaintiffs on Freeman's account" make in the present case? It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are not found in the bill of lading itself: and, therefore, they cannot alter the nature and construction of it. I say they were not in the bill of lading itself; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was received, and in that there is no restriction or qualification whatever; but it appeared by some other evidence—I suppose by some letter of advice, that the goods were so sent, to be sold by the plaintiffs on Freeman's account. Supposing that

⁽a) Lord Mansfield's papers were in the riots of that period. Solomons then burnt, together with his house, v. Nyssen.

the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for these goods afterwards, will not put Turing in a better condition in this case; for a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account (a). The truth of the case, as I consider it, is that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay themselves the 520l. advanced in bills out of the produce, and to be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as 510l., Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But I hold that a factor who has the legal property in goods can never have that property taken from him, till he is paid the utmost farthing which is due to him. Kruger v. Wilcocks, Ambl. 252.

This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, whether the defendant, who stands in the place of the original owner, had a right to stop the goods in transitu? And as to the first, every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee (b). In 1690 it was so decided in the case of Wiseman v. Vandeputt, 2 Vern. 203. In 1697, the court determined again in Evans v. Martlett that the property passes by the bill of lading. That case is reported in 1 Lord Raym. 271, and in 12 Mod. 156; and both books agree in the points decided. Lord Raymond states it to be, that if goods by a bill of lading are consigned to A., A. is the owner, and must bring the action: but if the bill be special to be delivered

⁽a) Acc. Houghton v. Matthews, 3 B. & P. 488; Mann v. Shifner, 2 East, 529; Hudson v. Grainger, 5 B. & Ad. 27; Drinkwater v. Goodwin, Cowp. 251.

⁽b) [See as to this Burdick v. Sewell, 10 App. Ca. 74.] Wiseman v. Vandeputt.

to A., to the use of B., B. ought to bring the action: but if the bill be general to A., and the invoice only shows that they are on account of B. (which I take to be the present case), A. ought always to bring the action; for the property is in him, and B. has only a trust. And Holt, C. J., says the consignee of a bill of lading has such a property as that he may assign it over; and Shower said it had been so adjudged in the Exchequer. In 12 Mod. it is said that the court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another; that is, where on the face of the bill it imports to be for another. In Wright v. Campbell, in 1767 (4 Burr. 2046), Lord Mansfield said, "If the goods are bona fide sold by the factor at sea (as they may be where no other delivery can be given) it will be good notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold bona fide, and by the owner's own authority." His lordship added (though that is not stated in the printed report) that the doctrine in Lord Raymond was right, that the property of goods at sea was transferable. In Fearon v. Bowers (a), in 1753, Lord Chief Justice Lee held that a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In Snee v. Prescot, in 1743 (1 Atk. 245), Lord Hardwicke says, "Where a factor, by the order of his principal, buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the principal, in such case the factor cannot countermand the bill of lading; but it passes the property of the goods fully and irrevocably to the principal." Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits, too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In Caldwell v. Ball, in 1786, (1 Term Rep. 205,) the court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in

⁽a) [Accord. The Tigress, Brown Adm. 97. See, however, Glyn v. E. & Lushington's Adm. Ca. 38; 32 L. J. W. I. Dock Co., 7 App. Ca. 591.]

the cargo. In Hibbert v. Carter, in 1787, (1 Term Rep. 745,) the court held again that the indorsement and delivery of the bill of lading to a creditor primâ facie, conveyed the whole property in the goods from the time of its delivery. The case of Godfrey v. Furzo, 3 P. Wms. 185, was quoted on behalf of the defendant. A merchant at Bilboa sent goods from thence to B., a merchant in London, for the use of B., and drew bills on B. for the money. The goods arrived in London, which B. received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchant in London, praying that the goods might be accounted for to him, and insisted that he had a lien on them till paid. Lord Chancellor says, - "When a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy." The whole of this case is clear law; but it makes for the plaintiffs and not the defendants. The first point is this very case; for the bill of lading here is generally to the plaintiffs, and therefore on their account; and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there stated is, what is the law in the case of a pure factor, without any demand of his own? Lord King says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance, or under acceptances on account of the goods, is simply and merely a servant or agent; for which no authority has been.

or, as I believe, can be produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear. So far from the contrary appearing here, when it was thought proper to allege on this demurrer that the price of the goods was not paid, it is expressly so stated; for the demuirer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and more factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will: whether they be actually in the factor's possession, or only on their passage, makes no difference; the principal may countermand his order: and though the property remain in the factor till such countermand, yet from that moment the property revests in the principal, and he may maintain tracer. But in the present case the plaintiffs are not that mere agent or servant; they have advanced 510%, on the credit of those goods, which at a rising market were worth only 557/.; and they have besides, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the bar, that the property never passed out of Turing; and to prove it, Hob. 41 was eited. In answer to this I must beg leave to say, that the position in Hobart does not apply; because there no day of payment was given; it was a bargain for ready money, but here a month was given for payment. And in Noy's Maxims, 87, this is laid down: "If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." Thorpe v. Thorpe, Rep. temp. Holt, 96, and Brice v. James, Rep. temp. Lord Mansfield, S. P. So Dy. 30 and 76. And in Shep. Touch. 222, it is laid down, that "If one sell me a horse, or anything for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof; and I may have an action for the thing, and the seller for his money."

Thus stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, nor even a dictum, if properly understood, which impeaches this long string of cases. On the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendants to show that they have superior equity which bears down the letter of the law; and which entitles them to retain the goods against the legal right of the plaintiffs, or they have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against; for the noble lord who pronounced that judgment, emphatically observed in it, "that the plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements: nor are they affected by any notice of those circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them.

But the second question made in the case is, that however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods in transitu, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods in transitu, and on the nature and principle of liens. 1st, Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights (a). They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lien upon his own goods, or right to stop his

⁽a) See the distinction drawn by session and that of property, post in Bayley, J., between the right of pos-notis.

own goods in transitu. If the goods he his, he has a right to the possession of them whether they be in transitu, or not: he has a right to sell or dispose of them as he plouses, without the option of any other person; but he who has a hen only on goods, has no right so to do; he can only retain them till the original price be paid; and therefore if goods are sold for 500%, and by a change of the market, before they are delivered, they become next day worth 1000%, the vendor can only retain them till the 500%, be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the 500% - 2ndly, Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone (a). Brilly. The right of stopping in transitu is founded only on equitable principles, which have been adopted in courts of lar; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1600, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self-evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods: but, by the general usage in trade, he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In Suce v. Prescot, Lord Hardwicke says that which not only applies to the case of liens, but to the right of stopping goods in transitu under circumstances similar to the case in judgment: for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So in Lempriere v. Pasley, (2 Term R. 485.) the court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing in transitu to the extent contended for by the defendants: but before I go into

⁽a) See Levy v. Barnard, 8 Taunt. 149. See post, in notâ.

them, with your lordships' permission, I will state shortly the facts of the case of Snee v. Prescot, with a few more observations upon it. The doctrine of stopping in transitu owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not, as the counsel for the defendants would make it, whether the property vested under the bill of lading? for that was considered as being clear: but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment? or, in other words, divest the property which was vested in the consignee? Snee and Baxter, assignees of John Tollet, v. Prescot and others, 1 Atk. 245. Tollet, a merchant in London, shipped to Ragueneau and Co., his factors at Leghorn, serges to sell, and to buy double the value in silks; for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked T.; Dawson signed three bills of lading, to deliver at London to factors' consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, and Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to Prescot, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which Prescot got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them: and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st, That the factors should be paid; 2nd, the pawnees; and 3rd, the surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignees or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for be thought to have any weight, I answer, 1st, That such provision was

tounded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indersement. Lord Hardwick considered the logal property in that case to remain in the consignor, and, therefore, gave him the preference. 2ndly, That whatever might be the law, the more fact of the consignor's being in possession was a sufficient reason for a court of equity to say, We will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwolle axpressly said - "This court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half-price which they have laid down upon them. He who seeks equity must do equity; and, if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will show that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances." The case of Snee v. Present is miscrably reported in the printed book: and it was the misfortune of Lord Harlwieke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and, perhaps, even he himself, by being very diffuse, has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS, note taken, as I collect, by Mr. John Cox, who was counsel in the cause: and it seems to me that, on taking the whole of the case together, it is apparent that, whatever might have been said on the law of the case in a most elaborate opinion, Lord Hardwicke decided on the equity alone, arising out of all the particular circumstances of it, without meaning to settle the principles of law on which the present case depends. In one part of his judgment he says that, in strictness of law, the property vested in Tollet at the time of the purchase: "but, however that may be," says he, "this court will not compel the factors to deliver the goods without being disbursed what they have laid out." He begins by saying, "the demand is as harsh as can possibly come into a court of equity." And in another part of his judgment he says, "Suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, vet this court would not suffer them to take out execution for the whole

value, but would oblige them to account." But further, as to the right of seizing or stopping the goods in transitu, I hold that no man, who has not equity on his side can have that right. I will say with confidence, that no case or authority, till the present judgment, can be produced to show that he has. But on the other hand, in a very able judgment delivered by my brother Ashurst, in the case of Lempriere v. Pasley, in 1788, 2 Term Rep. 485, he laid it down as a clear principle, that, as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason: for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favour; and if he have law and equity both with him he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion, delivered in this house by the learned and respectable judge (a), who has often had the honour of delivering the sentiments of the judges to your lordships, when you are pleased to require it, so lately as the 14th of May, 1790, in the case of Kinloch v. Craig, 3 Term Rep. 787, it was laid down that the right of stopping goods in transitu never occur but as between vendor and vendee; for that he relied on the case of Wright v. Campbell, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to show that it is not the case of vendor and vendee. terms vendor and vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is privity in the disposition of the things about which we are talking. If A. sell a horse to B., and B. afterwards sell him to C., and C. to D., and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee, for A. never sold to D., nor did D. ever buy of A. These terms are correlatives, and never have been applied, nor ever can be applied, in any other sense than to the persons who bought and sold to each other. The defendants, or Turing, in whose behalf and under whose name

⁽a) Eyre, then Lord C. B.

and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the foreible words of the noble judge who pronounced the judgment in question) represent Freeman so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would but the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal charness, without requiring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment put an end to all questions about the right of scaring in transitu. Two other cases were mentioned at the bar which deserve some attention. One is the case of the assignees of Burghall v. Howard (a), before Lord Mansfeld at Guildhall, in 1759; where the only point decided by Lord Manstehl was, that if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may save the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case; for when he made use of the word assigners, he undoubtedly meant assignces under a commission of bankruptcy, like those who were then before him, and not persons to whom the consignee sold the goods; for in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord Minsheld added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods in transitu is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property are all true: and that is all that the words mean: not that the property did not pass by the bill of lading. The

commercial law of this country was never better understood, or more correctly administered, than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and when we find him in other instances adopting the language and opinion of Lord Chief Justice Holt, and saying, that since the cases before him it had always been held, that the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even the case of Savignac v. Cuff (a), of which we have no account besides the loose and inaccurate note produced at the bar, as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord Mansfield answered, the plaintiff had lost his lien, he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so; which, as stated, was no answer to the question made. But I think enough appears on that case to show the grounds of the decision, to make it consistent with the case of Wright v. Campbell, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice, that Lingham had not paid for the goods; and if so, then, according to the case of Wright v. Campbell, he could only stand in Lingham's place. But the necessity of recurring to the question of notice strongly proves, that, if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods in transitu: but that, having seized them, the plaintiff would have been entitled to recover the full value of them for him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration; because it shows how far only the right of seizing in transitu extends, as between the consignor and consignee. The plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods; but the consignee had paid 1501., on account of

⁽a) Cited in 2 Term Rep. 66.

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them. Upon the insolveney of the consigner, the consigner served the goods in transitu; but that was holden not to be justifiable, and therefore there was a verifiet against him. That was an action of trivery, which could not have been sustained but on the ground that the property was vested in the consignce, and could not be served in transitu as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consigner's taking his own goods? But it was holden that he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee: but though the property were in the consignce, yet, as I stated to your landships in the outset, if the consignor had paid to the consigner all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee; and upon paying or tendering that money, and demanding the goods, the property would have revested in him, and he might have maintained trover for them: but admitting that the consignice had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover; and in ascertaining them, regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than for 150%. He was entitled to no more, the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as the case of Wiseman v. Vandeputt; where, thought it was determined that the legal property in the goods, before they arrived was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him: but for what was due, the court directed an account; and if anything were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and therefore, if anything be due to them, even in equity, that must be paid before any person can take the goods from them; and 520l. was due to them, and has not been paid.

After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped in transitu, after they have been sold and paid for, or money advanced upon them bonâ fide, and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say, that in all mercantile transactions, one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible. If this judgment stand, no man will be safe either in buying or in lending money upon goods at sea. That species of property will be locked up; and many a man who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would receive a check which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market; and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, nor a right to seize in transitu. The great advantage which this country possesses over most, if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports: but amidst all these indulgences, the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London: — A cargo of goods of the value of 2000l. is consigned to a merchant in London; and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accepts the bills, he becomes absolutely and unconditionally liable; if he refuses them, he disgraces his correspondent, and loses his custom directly. Yet to engage for 2000l., without any security from

the drawer, is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, how can I secure myself at all events? The answer is, I will insure; and then if the goods come safe I shall be repaid out of them; or, if they be lost, I shall be repaid by the underwriters on the policy; but this cannot be done unless the property vest in him by the bill of lading; for otherwise his policy will be void for want of interest (a); and an insurance, in the name of the foreign merchant, would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2000/, in his banker's hands, which he can part with, and not find any inconvenience in so doing; but there is another case to be considered, viz. - Suppose the merchant here has not got the 2000l, and cannot raise it before he has sold the goods? - the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in Succ v. Prescot; and upon that idea he has hitherto had no difficulty in doing so; but if he have not the property, nobody will buy of him; and then his trade is undone. But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, that barilla is shipped for a merchant here, at a time when there has been a dearth of that commodity, and it produces a profit of 251. per cent., whereas, upon an average, it does not produce above 12/. The merchant has advices that there is a great quantity of that article in Spain, intended for the British market; and when that arrives, the market will be glutted, and the commodity much reduced in value. He wishes, therefore, to sell it immediately whilst it is at sea, and before it arrives; and the profit which he gets by that is fair and honourable: but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall, I am confident that if the goods in question be retained from the plaintiff without repaying him what he had advanced on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and public policy, forbid it. To sum up the whole in very few words: the legal property was in the plaintiff; the right of seizing in transitu is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it; and the law, where it adopts the reasoning and principles of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your lordships, as my humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

Ashurst and Grose, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

Eyre, C. J., Gould, J., Heath, J., Hotham, B., Perryn, B., and Thomson, B., contra.

This case stood over from time to time in the House: and was postponed, in order to consider a question which arose in another case of Gibson v. Minet, upon the nature and effect of a demurrer to evidence, which was thought to apply also to the present case; and, finally, the House reversed the judgment of the Exchequer Chamber, which had been given for the defendant; and ordered the King's Bench to award a venire de novo (upon the ground that the demurrer to evidence appeared to be informal upon the record) and that the record be remitted.

This celebrated case involves two important propositions. The former is, that the unpaid vendor may, in case of the vendee's insolvency, stop the goods sold in transitu. The latter, that the right to stop in transitu may be defeated by negotiating the bill of lading with a bonâ fide indorsee.

The right of a vendor to stop in transitu is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the property of one man were to be disposed of in payment of the debts of another. The doctrine was first introduced in Equity by the cases of Wiseman v. Vandeputt, 2 Vern.

203; Some v. Present, I.Ath. 240, and Prayada v. Lowert 2. Lower, 75; Amb., 39. It has since been repeatedly discussed in court of common law and it appears street. (Lot the up., 1997) in the not been for many years one of the most precise of the district the precise of the upon the control of sale has never a get be in as extensive.

A filterly interesting disquisition upon its history and character will be found in Lord Theory's pulsions in (116) as a first thought M as W ...

Lord k man in the same of the 7 mills was at opinion that it was not a resolve on of the sale but was its use his backdars own works can equitable lien adopted by the law for the purpose of substantial justice," whence it was held to follow that part payment of the price by the vendee would not destroy the right to stop in transitu, but only diminish the lien pro tanto.

Confusion has sometimes arisen on this subject, from its being assumed that a vendor's right over the goods in respect of his price is subject to the same rules as an ordinary lien which cannot exist without both the right and the fact of possession, and is lost and cannot be resumed if the party claiming it abandon either the possession, or the right to possess the thing over which it is claimed: whereas "the vendor's right in respect of his price," says $B \circ \ell \circ A$, a layering judgment in Brownian Samuel, 4 B $_{*}$ ($^{\circ}$ 948 $_{*}$ is not a more lien which he will forfeit if he parts with the possession but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession, and the right of property, vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession Ind. v. Hollman 2. 5 T. R. 216. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right in virtue of his original ownership to stop them in transitu. Mason v. Lickbarrow, 1 H. Bl. 357; Lies v. Haut, 3 T. R. 464; Holys a v. Lov. 7 T. R. 440; Inglis v. Usberwood, 1 East, 515; Bothlank v. Inglis, 3 East, 381. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the passessor, and his insolvency without payment of the price defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act on their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights - Gordon v. Harper, 7 T. R. 9."

This luminous view of the principles upon which an unpaid vendor's right depends is, as will have been seen, totally inconsistent with the idea that stoppage in transitu operates as a rescission of the contract of sale, and deserves the more attention because it is contained in the written judgment of the court delivered after a curia advisari vult; see, too, Edwards v. Brewer, 2 M. & W. 875; Martindale v. Smith, 1 G. & D. 1, 1 Q. B. 397, S. C.; [the opinion of Buller, J., in the text, p. 781, and the judgment of Williams, J., in Johnston v. Stear, 15 C. B. N. S. 330, 339.]

In Wentworth v. Outhwaite, 10 M. & W. 451, Parke, B., in delivering the judgment of the Court of Exchequer, stated that the question discussed above, "what the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided," and that "there are difficulties attending each construction." In that case one of several parcels of goods sold under an entire contract had reached the place of destination; and upon the stoppage of the rest in transitu, the vendor insisted that the effect was to rescind the contract of sale altogether, and consequently to revest in him the property in the part which had reached the place of destination. The barons of the Exchequer decided against that argument, but for different reasons; the majority of the court, Parke, Alderson, and Rolfe, BB., being strongly inclined to think, that upon the weight of authority a stoppage in transitu must be considered, not as a rescission of the contract, but as merely replacing the vendor in the same position as if he had not parted with the possession; from which it followed that the vendor's right of lien on the part stopped was revested; and no more; whilst Lord Abinger expressed an opinion, to which on consideration he adhered, that the effect of stoppage in transitu is to rescind the contract; but he did not think that that affected the right of the vendee in the case before the court, to retain the portion of the goods which had been actually delivered to him; or, in other words, had reached the place of their destination; more especially when the goods and the price might be apportioned and a new contract be implied from the actual delivery and retention of a part.

The arguments in Wentworth v. Outhwaite contain the authorities on either side of the question, to which may be added, that in the latter case of Jenkyns v. Usborne, 8 Scott, N. R. 522, 816, Tindal, C. J., in delivering a considered judgment of the Court of Common Pleas, spoke of stoppage in transitu as a right to rescind the contract; but the nature of the right was not there in question.

It is conceived (notwithstanding the weight of Lord Abinger's opinion on a subject in which his practised and sagacious mind was eminently calculated to arrive at a correct conclusion) that the preponderance of reason and authority is in favour of the opinion expressed by the majority of the court in Wentworth v. Outhwaite. [And it would seem to be in accordance with this view that the right of stoppage has been held to be a proper subject of a bill in equity. See Scotsman v. Lancashire and Yorkshire Railway Co., per Lord Cairns, L. R. 2 Ch. 332, 36 L. J. Ch. 361. In Kemp v. Falk, 7 App. Ca., at p. 581, Lord Blackburn says: "It is pretty well settled now that a stoppage in transitu would not rescind the contract."

The right of stoppage is not only to countermand delivery to the vendee, but to order delivery to the vendor, and the master on receiving such order is bound to deliver to the latter as soon as he knows that the order was given by him. *The Tigress*, Brown & Lush., Adm. Ca. 38; 42 L. J. Adm. 97.]

Supposing the contract of sale not to be rescinded, it seems to follow, that

the goods, while detained remain at the risk of the vendee, and that the vender can have no right to reself them, at all events until the period of crodit is expired; after that period, indeed, the refusal of the vendee or his representatives to receive the goods and pay the price, would probably be held to entitle the vender to check to reselve the contract. See Limiting v. The Salk 113.

But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them till the time of credit has expired? In such a case it is submitted that courts of law having originally adopted this doctrine of storgarder on transactor from equity, would act on equilable principles by holding the vendor invested with an implied authority to make the necessary sale.

[For the right of an unpaid vendor somewhat analogous to that of stoppage is transita, see Laporte Challanas, L. R. s.Ch. 289, 41 L. J. Ch. 37, where it was held that "when a purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered." It has been held by the Judicial Committee of the Privy Council that the above right is not destroyed, though the vendor retain the goods as warehouseman for the vendee. Grice v. Richardson, 3 App. Cas. 319; 47 L. J. P. C. 48. It exists independently of the question whether there has not been an actual rescission of the contract, for it must not be overlooked that mere insolvency by itself does not operate to dissolve the contract. Insolvency, however, coupled with other facts, is evidence of the vendee's intention not to stand by the contract, upon which the vendor may act, so that by the consent of both parties the contract may be rescinded. Morgan v. Bain, L. R. 10 C. P. 15; 44 L. J. C. P. 47; Gunn v. Bolchow, L. R. 10 Ch. 491; 44 L. J. Ch. 733; In re Phanix Co., 4 Ch. D. 108; 44 L. J. Ch. 683; Impered Bank v. London and St. Katherine's Dock Co., 5 Ch. D. 195; 46 L. J. Ch. 335 [

It is hardly necessary to add, that a wrongful stoppage in transitu has not the effect of rescinding the contract of sale, or of affecting the vendor's right to sue for the price, acquired before the stoppage. In re-Humbertson, 1 De Gex, 262; and see Gilbard v. Brittan, 8 M & W 575

[The acceptance of a bill for the price of the goods by the vendee does not take away his right to stop, unless the bill is taken in payment whether paid or not. Frise v. Wray, 3 East, 93; Edwards v. Brewer, 2 M. & W. 375.]

The person who stops in transitu must be a consignor [or vendor]. A mere surety for the price of the goods has no right to do so. SigNen v. Wray, 6 East, 371. [Though perhaps where the surety has paid the vendor, he may obtain the right to stop in his name under the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 5. See Imperial Bank v. London and St. Katherine's Dock Co., 5 Ch. D. 195; 46 L. J. Ch. 335.] But a person residing abroad, who purchases goods for a correspondent in England, whom he charges with a commission on the price, but whose name is unknown to those from whom he makes the purchases, may stop the goods in transitu if his correspondent fail while they are on their passage, for the [purchaser] abroad [may] be considered as a new vendor, selling the goods over again to the merchant in England, and only adding to the price the amount of his commission. Feise v. Wray, 3 East, 93; see [Falke v. Fletcher, 18 C. B. N. S. 403; 34 L. J. C. P. 146; and] Newsom v. Thornton, 6 East, 17, where a person who had consigned

goods to be sold on the joint account of himself and the consignee, was held entitled to stop them in transitu, the consignee becoming insolvent. [So a person who buys goods for another on his own credit and takes bills of lading indorsed for delivery to his own order, and then indorses the bills to the party for whom he bought, is a vendor for the purpose of stoppage in transitu: The Tigress, Brown & Lush. Adm. Ca. 38; 32 L. J. Adm. 97; and where a vendee's broker, being liable by custom for the price of goods, paid the vendor, it was held that "having regard to the terms of the Mercantile Law Amendment Act, (19 & 20 Vict. c. 97, s. 5,) and to the justice of the case, the lien of the unpaid vendors was a security which subsisted for the benefit of the broker who paid the money, and therefore he could in their name have stopped the goods:" Imperial Bank v. London and St. Katherine's Dock Co., 5 Ch. D. 195; 46 L. J. Ch. 335. In Hathesing v. Laing, L. R. 17 Eq. 92; 43 L.J. Ch. 233, Bacon, V.-C., would seem to have held that a broker who had paid the price of goods for his principal the vendee, and had shipped them in the vendee's name, was not in the position of a vendor, so as to stop in transitu; but the case was decided also on other grounds, and as regards this point is perhaps hardly reconcileable in principle with those last cited.]

In Jenkyns v. Usborne, 8 Scott, N. R. 522; 7 M. & G. 678, S. C., it was attempted, but without success, to confine the right to vendors in whom the property in the goods has actually vested at the time of the stoppage, and to exclude from it a vendor in whom the property in the goods had not vested at the time of the stoppage, but only an interest in and right to receive a certain portion of a cargo to be afterwards ascertained and appropriated to the parties interested in it, of whom he was one. Tindal, C. J., in giving judgment said: "We see no sound distinction, with reference to the right of stoppage in transitu, between the sale of goods the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him; if he may rescind the contract in one case, for the insolvency of the purchaser, he must, by parity of reasoning, have the right to rescind it in the other." As to what is a sufficient authority from the vendor to enable another person on his behalf to stop goods in transitu, see Whitehead v. Anderson, 9 M. & W. 518; [Kemp v. Falk, 7 App. Ca. 585.]

Stoppage in transitu, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them. And, therefore, in most of the cases the dispute has been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that they are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, [Ex parte Rosevear China Clay Co., per Brett, L. J., 11 Ch. D., at p. 570, and also so long as they remain in any place of deposit connected with their transmission. that, if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop in transitu. See Nicholls v. Lefevre, 2 Bing. N. C. 83; James v. Griffin, 1 M. & W. 20; Edwards v. Brewer, 2 M. & W. 375; [Nicholson v. Bower, 1 E. & E. 172, per Lord Campbell, C. J.;] and James v. Griffin, iterum, 2 M. & W. 623, (where the court differed on the question whether evidence of the vendee's intention not to take possession uncommunicated to the wharfinger was admissible,) Mills v. Ball, 2 B. & P. 457;

Holgson v. Lay, 7 T. R. 440; Smith v. Goss, 1 Camp. 282; Coats v. Rollon, 6 B. & C. 422; [as to which case, however, see Koald v. Marshall, 11 Q. B. D., at p. 360, per Brett, L. J.; Richardson v. Goss, 3 B. & P. 127; Soid v. Perd, 3 B. & P. 469; Foster v. Frampton, 6 B. & C. 109; Rove v. Pickforn, S. Laint. 83; [Harry v. Mangles, 1 Camp. 452, Stareld v. Haghes, 13 East. 408; [Heinelog v. Larle, 8 E. & B. 410, affirmed in error, Ibid., 427; Le porte tracting, 29 L. T. N. S. 431; Bolton v. Lane, & Y. Rail, C. J. R. 1 C. P. 431, 35 L. J. C. P. 137; Rod pr. v. The Complain of Usempte d. Paris, L. R. 2 P. C. 398; F. e. parte. Watson, In re. Law, 5 Ch. D. 35; 46 L. J. Bank. 71; Merchant Banking Co. v. Phanix Bessener Steel Co., 5 Ch. D. 205, 46 L. J. Ch. 419; and see Cooper v. Bith, 3 H. & C. 722; 34 L. J. Exch. 161

The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the transitus, although the place be not that of their ultimate destination. Wentworth v. Outhweite, 10 M. & W. 4.36; Do Ison v. Wentworth 5 Scott N. R. 821; 4 M. & Gr. 1080, S. C.; [see Cusack v. Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261; because in such a case the goods have got into the hands of agents for the buyer, not concerned merely in the carriage of the goods. And the same, as it seems, where the goods have got into the hands of a person employed by the buyer to receive them from the first carrier or out of the warehouse where they were when sold, and give them a new destination, as in Valpy v. Gibson, [4 C. B. 837,] where the goods had been ordered for the Valparaiso market, and the Court of Common Pleas expressed their opinion that the transit was at an end upon the arrival of the goods in the hands of the vendee's shipping agent at Liverpool. [See also Ex parte Gibbs, In re Whitworth, 1 Ch. D. 101; 45 L. J. Bank, 10.

Secus where the goods are only arrived in a vessel at a port for orders, though the vendee is to give the orders for the ultimate destination, Fraser v. Witt, L. R. 7 Eq. 64, and also where the goods were delivered at the port of destination to a warchouseman not named by the consignee, but who considered himself to be acting as agent for the consignee, Ex parte Barrow, 6 Ch. D. 783; 46 L. J. Bank. 71; and see Ex parte Watson, 5 Ch. D. 35; 46 L. J. Bank. 97, where goods were forwarded by the vendor from Yorkshire to London, to be there shipped for Shanghai by the vendee, on the terms of a special arrangement between the vendor and vendee, whereby inter alia, the former was to have a lien on the bill of lading and shipment. It was held that the transitus continued from Yorkshire to Shanghai.

On the other hand, where the purchaser, Loeffler, of goods at Bolton directed the vendor Kendal to send the goods to Garston, and at the same time instructed his agents Marshall. Stevens & Co. at Garston, to forward them to Rouen, it was held that the transit ceased when the goods reached Garston and were lying there in the warehouses of the railway company who had given Marshall. Stevens & Co. the usual notice that the goods had arrived, and that if delivery were not taken in due course the company would hold them as warehousemen and would charge rent; Kendal v. Marshall, 11 Q. B. D. 356; 52 L. J. Q. B. 313. Ex purte Miles, 15 Q. B. D. 39, is a somewhat similar case, in which the transit was held as a matter of fact to be over on the arrival of the goods at a place short of their final destination.]

In Cowasjee v. Thompson, 5 Moo. P. C. 165, the goods were purchased in London "free on board," to be paid for upon delivery on board, in a bill at six months, or cash less two and a half per cent. discount, at the seller's option. The goods were delivered by the seller into a vessel indicated by

the purchaser, and a receipt for them was obtained from the mate, which the seller kept. The seller elected to be paid by bill, which was accordingly given, and the master, without requiring the return of the mate's receipt, signed bills of lading for the goods as shipped by the purchaser. By the custom of the port, the phrase "free on board" imports that the buyer is considered as the shipper, though the seller is to bear the expense of shipment. The Judicial Committee held that the transit was at an end, and the right to stop gone, so soon as the goods were put on board, and the bill given for the price. Quære. [See Ex parte Rosevear China Clay Co., 11 Ch. D. 560.]

See also Van Casteel v. Booker, 2 Exch. 691, [Key v. Cotesworth, 7 Ex. 595; Browne v. Hare, 3 H. & N. 484, affirmed in error, 4 H. & N. 822; 29 L. J. Exch. 6; Schuster v. M'Kellar, 7 E. & B. 705; Green v. Sichel, 7 C. B. N. S. 747; Moakes v. Nicholson, 19 C. B. N. S. 290, 34 L. J. C. P. 273; Shepherd v. Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148,] as to how far the intention with which the goods were shipped may affect the question, and when and how far in this sort of case it is one of fact for the jury even though the documents are not express upon the point. [For a case where the facts were in a court of equity, held to negative a transit, the ship belonging to the buyer, see Schotsmans v. L. & Y. Rail. Co., L. R. 2 Ch. 332, 36 L. J. Ch. 361. For the reverse case, where the ship was only chartered by the buyer, Berntdson v. Strang, L. R. 4 Eq. 481, 3 Ch. 588, 37 L. J. Ch. 665; Ex parte Rosevear China Clay Co., 11 Ch. D. 560.]

Whilst, however, goods sold remain in the hands of a carrier employed to convey them to their original destination as between the buyer and seller, no case of constructive possession in the buyer arises, unless "where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given Whitehead v. Anderson, 9 M. & W. 518. [Ex parte Cooper, 11 Ch. D. 77, per James, L. J.] And in the absence of such a new agreement, it seems that the mere acts of marking or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with the intention to take possession, do not establish a constructive possession in the buyer, or affect the right to stop in transitu, Ibid.; [Coventry v. Gladstone, L. R. 6 Eq. 44, 37 L. J. Ch. 492, and see Dixon v. Yates, 5 B. & Ad. 313. [In the case of Exparte Golding, Davis & Co., Limited, 13 Ch. D. 628, it was held that the signature by the ship-master of the bill of lading made out in the name of a sub-purchaser did not terminate the transitus indicated by the original purchaser.]

The same law holds in the case of goods which, when sold, are on a wharf or in a dock, where they are intended to remain until taken away by the buyer. In such a case the goods are considered as constructively in transitu (see the remarks of Lord Abinger in Gibson v. Carruthers, 8 M. & W. 341), and the right of the vendor to stop in transitu remains so long as the goods are not taken away, and the warehouse keeper or dock owner has not become the agent of the buyer, see Dixon v. Yates, 5 B. & Ad. 313; Tanner v. Scovell, 14 M. & W. 28, where the wharfinger, upon orders received direct from the seller, to weigh and deliver the goods to the buyer, had accordingly furnished the seller with the weights and delivered a portion of the goods to the buyer's order; yet, inasmuch as the wharfinger had not received warehouse rent

from the buyer, or transferred the goods into his name, or done any other act to become his agent, the rest of the goods, without regard to whother the property in them had vested in the buyer or not, were considered subject to the seller's right of stopping in transita; and Lankon, ton v. Athert u, 5 Scott, N. R. 35; 7 M. & Gr. 350, S. C., where the seller, who had hunself bought the goods of the importer, in whose name they were warehoused in the West India Docks, gave the buyer a delivery order upon which the dock company refused to act, because not given by the importer; and upon the subsequent insolvency of the buyer, the seller himself obtained a delivery order trop the importer and possessed himself of the goods; and see Lapertai Bank v. Lendon & St. K. Dock Co., 5 Ch. D. 195, 46 L. J. Ch. 335.

The question in all such cases seems to be, whether the warehouseman at the time of the stoppage held the goods as agent for the consigner, or as agent for the consigner.

As to the effect of a delivery order both with respect to stoppage in transitular and otherwise, see Horman V. Anderson, 2 Camp. 243; Stenate V. Inc. kin, 4bid, 344; Bentill V. Burn, 3 B. & C. 423; Format V. Home, 16 M. & W. 119; J. Scorle V. Kerves, 2 Esp. 598, general; Alerania V. Home, 16 M. & W. 119; J. Scorle V. Kerves, 2 C. & P. 86; Sommerk V. Schleren, 9 A. A. & E. 895; Melling V. Kelshaw, 1 C. & J. 184; M. E. man, 8 Melling V. Kelshaw, 1 C. & J. 184; M. E. man, 8 Melling V. Kelshaw, 1 C. & J. 184; M. E. man, 8 Melling V. Bowill, 3 Mancq. H. of L. 1; too "s. V. Kese, 17 C. B. 229; Penrania V. Ducson, E. B. & E. 148; Kinasford V. Merre, 1 H. & N. 503; Coventry V. Oliubstane, L. R. 6 Eq. (4, 37 L. J. Ch. 492; Young V. Lambert, L. R. 3 P. C. 142, 39 L. J. P. C. 21; Imparial Bank V. Lombon & St. K. Dock Co., 5 Ch. D. 195; 46 L. J. Ch. 335; Merch tat Banking Co. v. Phanix Co., 5 Ch. D. 205, 46 L. J. Ch. 41 Vict. c. 39, 8, 5 J.

If the vendor allow the vendee to take possession of part of the goods sold under an entire contract, without intending to retain the rest, his right to stop in transitu is gone. Ham word v. Anderson, 1 N. R. 69. See Sinky v. Hayward, 2 H. Bl. 504: Hanson v. Mayer, 6 East, 614. En parte Gibbes, 1 Ch. D. 101; 45 L. J. Bank. 10. See, however, Bolton v. The Lancashire, &c., Rail. Co., L. R. 1 C. P. 431, 35 L. J. C. P. 137]. But it is otherwise if he do intend to retain the remainder: Bunny v. Poyntz, 4 B. & Ad. 570; see Wentworth v. Outhwrite, 10 M. & W. 451; Tanner v. Scorell, 11 M. & W. 28. [Experte Chalmers, L. R. 8 Ch. 289, 42 L. J. Ch. 37.1]

It (has been) said that, promit facia, a delivery of part imports an intention to deliver the whole. Per Taunton, J., Bet's v. Gibbins, 2 A & E. 73. That dictum, however, which had been questioned by the author in his work on mercantile law diffth edition, 488, 5300, has been overruled by the Court of Exchequer in Tanner v. Scovell, 14 M. & W. 28, [and in Ex parte Cooper, 11 Ch. D., at p. 73, Lord Esher, M. R., (then Brett, L. J.,) laid it down "that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery of the whole," and in Kemp v. Falk, 7 App. Ca. 573, Lord Blackburn says that "if either of the parties dissent the part delivery is not a constructive delivery of the whole," and that he "rather thinks the onus is upon those who say it was so intended"]. In Tanner v. Scorell it was laid down that if the buyer takes possession of part, not meaning thereby to take possession of the whole, but to separate that part only, it puts an end to the transitus only with respect to that part and no more. In that case, under a general order to deliver the goods, the buyer procured the actual delivery of certain portions of them which he had resold,

and the delivery of those portions was held not to operate as a delivery of the whole, or to affect the vendor's right as to the rest.

And in Jones v. Jones, 8 M. & W. 431, the assignee of a cargo of goods under a trust deed took possession of part of the cargo upon its arrival, and directed the rest to be conveyed to a designated place, with the intention of obtaining possession of the whole for the purposes of the trust; and it was held that such taking possession of part did put an end to the transit; but it was in that case assumed to be clear law that the mere delivery of part to the buyer, if he means to separate that part from the remainder, does not amount to a delivery of the whole so as to defeat the right to stop in transitu.

In Tanner v. Scorell, supra, the whole question was stated to depend on the intention of the buyer; but perhaps that statement was intended to apply only to cases like Tanner v. Scorell, where it was in the power of the buyer at the time, if he pleased, to take all. [See the judgment in Bolton v. The Lancashire, &c., Rail. Co., L. R. 1 C. P. 431; 31 L. J. C. P. 137, where the buyer took part, having the power to take all, and refused to take the rest, and the right to stop was held not to be gone, and Ex parte Catling, 29 L. T. N. S. 431, also per Lord Blackburn, in Kemp v. Falk, 7 App. Ca. 586, cited supra. In Exparte Gibbes, 1 Ch. D. 101; 45 L. J. Bank. 10, it was held that there was a constructive delivery to the purchaser of the whole of the goods by a delivery of part. In Exparte Cooper, sup. it was held that part delivery did not amount to a constructive delivery of the whole where freight had not been paid on part of the undelivered goods, and in Kemp v. Falk, 7 App. Ca. 573, 52 L. J. Ch. 167, the facts were also held to exclude the notion of a constructive delivery of the whole cargo.

It was once thought that,] although the determination of the transit puts an end to the vendor's right to stop the goods, the vendee [could not] anticipate its natural determination, as for instance, by going to meet the goods at sea. Holst v. Pownall, 1 Esp. 240. Vide tamen, the judgment in Mills v. Ball, 2 B. & P. 461; Oppenheim v. Russell, 3 B. & P. 54; Foster v. Frampton, 6 B. & C. 107; and Whitehead v. Anderson, 9 M. & W. 518, where it was laid down as indisputable, that if the vendee take the goods out of the possession of the carrier into his own before their arrival, the right to stop in transitu is at an end; though if he were to take them without the consent of the carrier, it might be a wrong to him for which he would have a right of action. [See also The London and North Western Rail. Co. v. Bartlett, 7 H. & N. 400.]

The carrier cannot prolong the transit of the goods after arrival at the port of destination, by refusing to give them up to the consignee upon demand and tender of freight. Bird v. Brown, 4 Exch. 786 [but "Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract for conveyance," per Lord Fitzgerald in Kemp v. Fulk, 7 App. Ca. at p. 588.]

Nor can the vendor's right be defeated by the enforcement of the claim against the vendee, as, for instance, by process of foreign attachment at the suit of his creditor, or by the carrier's assertion of a general lien against him. Smith v. Goss, 1 Camp. 282; Butler v. Woolcot, 2 N. R. 64; Nicholls v. Lefevre, 2 Bing. N. C. 83. [And see Mercantile Bank v. Gladstone, L. R. 3 Ex. 233; 37 L. J. Ex. 130.]

To make a *notice* effective as a stoppage in transitu, it must be given to the person who has the immediate custody of the goods; or if given to the prin-

cipal whose servant has the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant, in time to prevent the delivery of the goods to the consignee. If his his arrange is to his servant, in time to prevent the delivery of the goods to the consignee. If his his his arrange is to his servant, in time to prevent the delivery of the goods to the consignee. If his his his arrange is a duty on the shipowner to communicate, see per Lord Bramwell. It is parter that his the D. 455; per Lord Blackburn, hemp v. Fack, 7 App. Ca. 585.]

A stoppage by an unauthorised person professing to act for the seller is inoperative, though ratified by the seller, if such ratification be after the period during which the seller himself could have stopped in transitu. Bord v. Brown, 4 Exch. 786.

The second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor. Small v. Moate, 9 Bing, 574. [Kerne v. Deslandes, 10 C. B. N. S. 205; 30 L. J. C. P. 297, S. C.; Shereban v. New Quay Co., 4 C. B. N. S. 618; Schester v. M. Kellar, 7 E. & B. 704 [11], therefore, the vendee sell the geods before they have been delivered to him, he sells them, generally speaking, subject to the vendor's right to stop in transitu. Direm v. Yeles, 5 B. & Ad. 113; Jerigus v. Uslarra, 8 Scott, N. R. 505; 7 M. & G. 678, S. C. though see per Lord Fitzgerald, Kemp v. Falk, 7 App. Ca. at p. 590. Subject to the vendor's rights the subvendee would of course be entitled to the goods, Kemp v. Falk, ubi sup.; Ex parte Golding, Davis, and Co., Limited, 13 Ch. D. 628.

But on the above rule the principal case has engrafted an exception; for the second and main point in Light report v. Mason is, that the vendee may, by negotiating the bill of lading to a bond fide transferce, defeat the vendor's right to stop in transitu. (And the recent act to amend the Factors' Acts, 40 & 41 Vict. c. 39, has extended this doctrine by enacting (s. 5) that: "Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indersement, or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, to a person who takes the same bond fide and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu." As to what is or is not a document of title to goods, see Gunn v. Bolckow, L. R. 10 Ch. 491; 44 L. J. Ch. 732; Kemp v. Falk, 7 App. Ca. 573; 52 L. J. Ch. 167.]

A succinct history of the law on this point is given by Lord Tenterden, in his admirable work on Shipping, [p. 388, 11th ed. by Shee, 442,] where he remarks, that "the earliest mention of the subject in our law books is the case of Evans v. Martlett, 1 Lord Raym. 271, 12 Mod. 156; in which Holt, C. J., said the consignee of a bill of lading has such a property that he may assign it over: and Shower said that it had been adjudged so in the Exchequer. But in that case, the effect of such an assignment was not properly before the court, and does not appear to have been discussed or argued; and the case supposed to be referred to by Shower has not been found. In the case of Snee v. Prescot, 1 Atk. 246, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon." He then proceeds to comment on the cases of Wright v. Campbell, 2046. 1 Bl. 628; Hibbert v. Carter, 1 T. R. 445; Caldwell v. Ball, Ibid. 205; and Lickbarrow

v. Mason; and concludes by stating, [p. 435, 11th ed.], that "that cause was tried again, and that the Court of King's Bench, at the head of which Lord Kenyon had in the meantime been placed, and who had, in another cause, expressed his approbation of the first judgment in this case, as being founded on principles of justice and common honesty, again decided the case without argument, in conformity to the first decision of that court; 5 T. R. 683; and in order that the question might again be carried to the other tribunals, another writ of error was brought; but it was afterwards abandoned, and it is now the admitted doctrine in our courts that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor."

[To defeat the vendor's right of stoppage, the indorsement of the bill of lading must be for value. In Rodger v. The Comptoir d'Escompte de Paris, L. R. 2 P. C. 393; 38 L. J. P. C. 30, it was held by the Privy Council that an antecedent debt was not a sufficient consideration to defeat the right of stoppage in transitu. But the Court of Appeal have expressly dissented from this case. Leask v. Scott, 2 Q. B. D. 376; 46 L. J. Q. B. 329, 576. In the former case, Lyall, Still & Co. being pressed by the respondents, who were their creditors to a large amount, executed an assignment of all goods and bills of lading, or other documents for goods to arrive in December, 1866. In pursuance of their agreement in the assignment, L. S. & Co., on the subsequent arrival of goods, indorsed the bills of lading to the respondents without receiving any consideration for such indorsement except an existing debt and the release of an antecedent agreement by L. S. and Co. to furnish bills and shipping documents, on the faith of which the advances were made by the respondents to L. S. & Co. At the time of the assignment it was notorious that the assignors were in difficulties; and by the assignment, if not before, they were made insolvent. It was held that the indorsement of the bills of lading did not defeat the vendor's right to stop in transitu. See The Chartered Bank of India v. Henderson, L. R. 5 P. C. 501, a somewhat similar case, in which it was held that the indorsement was for a sufficient consideration.

In Leask v. Scott (supra) the facts were as follows: On the 22nd December, 1875, Geen, Stutchbury & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London, by the Trinidad, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday the 1st of January, 1876, being prompt day, Geen & Co. being already indebted to the plaintiff, their fruit broker, in between 10,000l. and 11,000l., Mr. Geen applied to him for a further advance of 2,000l. The plaintiff said, "You may have it, but you must first cover up your account." Geen said he would give him cover, and the plaintiff's cashier at once handed Geen a cheque for 2,000l. On Tuesday the 4th day of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, 224l. 16s. 2d.: and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about 5.000l. in performance of their promise on the Saturday to give the plaintiff cover. On Saturday the 8th of January, Geen & Co. stopped payment. The Trinidad arrived off Liverpool on the 3rd of February, and the defendants sought to stop the nuts in transitu, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of the interpleader action.

In answer to questions by the judge, the jury found that the plaintiff received the bill of lading honestly and fairly—that valuable consideration was given on the understanding of security being given; and that the security given was to secure the 2,000%, and also the old account.

On behalf of the defendant it was contended, on the authority of Rodger v. The Comptair FEscompte de Paris, that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The Court of Appeal, whilst of opinion that the defendant's argument was the same as the ratio decidendi in Realger v. The Comptain of Seconds de Paris, distinctly declined to follow that case, holding that there was "not a trace of such distinction between cases of past and present consideration to be found in the books: and further, that practically such a past consideration" (quære, transaction) "as was then under discussion had always a present operation by staying the hand of the creditor." The judgment of Field, J., based upon the above case of Rodger v. The Comptoir, &c., was accordingly reversed. Another view of both of these cases might perhaps be that the giving of security should be treated as relating back to the agreement to give it, in which case it would have been given for a present consideration. Quare, how far Loask v. Scott is consistent with or overrules Sprinting v. Ruding, 6 Beav. 376.

Further, "although the shipper may have indorsed in blank a bill of lading, deliverable to his assignees, his right is not affected by an appropriation of it without his authority. It is not a negotiable instrument like a bill of exchange." Per Campbell, C. J., tiurney v. B. hvend, 3. E. & B. 633. See further that case, also Schuster v. M'Keller, 7. E. & B. 704; eThe Marie Joseph) Pease v. Glouher, L. R. 1 P. C. 219; 35 L. J. P. C. 66; Hathesing v. Leting, L. R. 17 Eq. 92; 43 L. J. Ch. 233; Galbert v. Gairgeon, L. R. 8 Ch. 16; Gieberron v. Kreeft, L. R. 10 Ex. 274; 44 L. J. Ex. 238; Org v. Shater, L. R. 10 C. P. 459; 1 C. P. D. 47; 45 L. J. C. P. 44; Mirabita v. Imperial Ottoman Bank, 3 Ex. D. 164; 47 L. J. Ex. 418; Gilgo v. E. & W. India Dock Co., 7 App. Ca. 591, 52 L. J. Q. B. 146, as to what state of facts has been held sufficient to establish the ability of the indorser to confer a good title on a bank fish indorsee, and also the Factors' Acts, which will be more fully noticed hereafter.]

If the assignee of a bill of lading act meth jide; for instance, if he knows that the consignee of the goods is insolvent, and takes the assignment of the bill of lading for the purpose of defeating the right to stop in transitu, and so defrauding the consignor out of the price; he will be held to stand in the same situation as the consignee: and the consignor will preserve his right of stoppage. Per Lord Ellenborough, delivering judgment in Cumming v. Brown, 9 East, 514.

And if the bill of lading contain a condition, $ex\ gr.$, if it be indorsed upon it that the goods are to be delivered, provided E. F. pay a certain draft, every indorsee takes it subject to that condition, and will have no title to the goods, unless it be performed. Barrow v. Coles, 3 Camp. 92.

[Where the shipper takes and keeps in his own or his agents' hands a bill of lading, making the goods deliverable to his own order to protect himself, the hold retained under the bill of lading is not merely a right to retain possession till the conditions upon which it was given are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default, *Ogg v. Shuter*, 1 C. P. D. 47; 44 L. J. C. P. 161.]

Where the goods are shipped under such circumstances as to show an intention that the property or right of possession should not vest in the consignee until some further act is done, such as payment, or handing over the bill of lading, no question of stoppage in transitu can arise before that act is done. See Turner v. Liverpool Docks, 6 Exch. 543; [Sheridan v. New Quay Co., 4 C. B. N. S. 618.]

In cases where a bill of lading may be, and has been, pledged by the consignee of the goods, as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them in transitu, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain, after satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledgor himself, the vendor will have a right to have all the pledgor's own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so.

This was decided In re Westzinthus, 5 B. & Ad. 817, where Lapage & Co. having purchased oil from Westzinthus, paid for it by acceptance: and being in possession of the bills of lading, pledged them with Hardman & Co., as a security for certain advances. Lapage & Co. became bankrupt, and their acceptance in the plaintiff's favour was dishonoured. At the time of their bankruptcy they owed Hardman & Co. 92711. on account of advances; as a security for which they held, besides the bill of lading, goods to the value of 99611. 1s. 7d., belonging to Lapage himself. The court held that Westzinthus, who had, upon the bankruptcy of Lapage & Co., given notice to the master of the ship that he claimed to stop the oil in transitu, had a right to insist upon the proceeds of Lapage's own goods being appropriated to the discharge of Hardman's lien, and, as they proved sufficient to satisfy it, had a right to receive the entire proceeds of his oils.

"As Westzinthus," said Lord Denman, delivering the judgment of the court, "would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession, for a valuable consideration to Hardman, it appears to us, that in a court of equity, such transfer would be considered as a pledge or mortgage only; and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage, in analogy to the common case of a mortgage of real estate, which is considered as a mere security, and the mortgagor, the owner of the land. therefore, think that Westzinthus, by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to Hardman's lien thereon), as against Lapage and his assignees, who are bound by the same equity that Lapage himself was; and this view of the case agrees with the opinion of Mr. Justice Buller, in his comment on the case of Snee v. Prescot in Lickbarrow v. Mason. If then Westzinthus had an equitable right to the oil subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety to Hardman for Lapage's debt; and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods deposited with him to pay his debt in ease of the surety. And all the goods, both of Lapage and Westzinthus, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first

instance, to the payment of the debt". See this last point followed in Exparts Alston, L. R. 4 Ch. 168, and see Corentry v. Gladston, L. R. 6 Lep 44 - 57 L. J. Ch. 472.

Symbolically Readon for General Section of the Section of the specific advance made upon security for a grown of the full of landing plant computer as to the latter point Readon v. The Constant of the full of landing Paris overruled by L. isk v. Scatt, and c. p. 800. In Kemp v. Folk, 7. App. Cn. 573, 52 L. J. Ch. 167, and L.r. paris toolding, Dates & C. Levetel, 13 Ch. D. 628, the cases of Spathling and Rading and Exparts West, inthese are followed and approved

Whilst, however, the indersement of a bill of lading might defeat the right of stoppage in transien, still before the statute 18 & 19 Viol. c. 411, the transfer of a bill of lading did not, like that of a bill of exchange, confer any right on the assignee to sue upon the contract expressed thereby. Thompson v. Domong, 11 M. & W. 403: Howevel v. 8b ph vil. 3 C. B. 296.

That statute, however, has altered the law in this respect. By the first section rights of action and liabilities upon the bill of lading are to vest in and bind the consigned or indersec to room the major to in the results shall pass. [See For v. Nott. 6 H. & N. 650; 50 L. J. Exch. 250 showing that the section was not intended to exonerate the original shipper; Short v. Simpson, L. R. 1 C. P. 248; 35 L. J. C. P. 147; and the St. Charles Brown's Lush. Adm. Ca. 4. As to what is primâ facir evidence that the property passed, see Dracachi v. The Angle-Egyptoin Brown, L. R. 3 C. P. 150; 37 L. J. C. P. 71; and see The Freedom, L. R. 3 P. C. 504.

The question whether indorsement and delivery of the bill of lading by way of security for an advance passes "the property in the goods" within this section, so as to make the indorsee liable for freight, has been very fully discussed in Bardiet v. Search, to Q. B. D. 363, 13 Q. B. D. 150, and 10 App. Ca. 74. In that case it was eventually decided by the House of Lords that where such indorsement and delivery operates merely by way of pledge, so as to give a special property only to the pledgee and not as an assignment of the whole property in the goods, the pledgee is not an indorsee to whom the property passes within the act. And semble (per Lord Selborne at p. 85, and Lord Blackburn at p. 96), it would be the same if the transaction were in fact a mortgage, though that point was not decided by the House of Lords (see p. 103).

The pledgee would, however, be liable, irrespectively of the Act, on the bill of lading if and when he should take delivery of the goods under the bill of lading, per Lord Selborne, ib. at pp. 86-89, and Men v. Chert, 31 W. R. 841, and 48 L. T. 944, on the ground that the fact of so doing is evidence of a new agreement by him with the shipowner to comply with the terms of the bill of lading.]

By the second section it is provided that the act is not to affect the right of stoppage in transitu, or claims for freight against the shipper or owner of the goods, or the consignee or indorsee as owner, or by reason of his receipt of the goods. It should seem that the statute has not altered the rule, that the indorsement of a bill of lading gives no better right to the indorsee than the indorser himself had, and that in this respect a bill of lading still differs from a bill of exchange in the same way as it did before the statute; see Gurney v. Behrend, 3 E. & B. 622. In that case the bill of lading was sent in a letter from a shipper, stating that he had drawn against the consignment,

and it was held that the acceptance of the draft was not thereby made a condition precedent to the right to negotiate the bill of lading, though if it had been, and had not been complied with, an indorsement of the bill of lading would not have defeated the seller's title. And see Key v. Cotesworth, 7 Exch. 595; [The Argentina, L. R. 1 A. & E. 370, and the cases on this point cited ante, p. 810.

If the shipper indorses the bill as a pledge, and whilst it is so held the goods are misdelivered, he may, on reindorsement of the bill to him on payment of the advance for which it was pledged, sue for the misdelivery. *Short* v. *Simpson*, 35 L. J. C. P. 147; L. R. 1 C. P. 248.

The rights and liabilities of the consignee or indorsee under the act, pass from him by indorsement over. *Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842; 31 L. J. C. P. 214; if the indorsement be such as to pass the property under the act, *Burdick* v. *Sewell*, *supra*.

But a consignee who has sold the goods, but has not indorsed the bill of lading to the purchaser, remains a consignee within the act, so as to be liable under the bill of lading, Fowler v. Knoop, 4 Q. B. D. 299; and conversely an indorsee has a right to sue thereon, although he has sold the cargo before taking proceedings: The Marathon, 40 L. T. N. S. 163.]

The third section provides that a bill of lading in the hands of a consignee or indorsee for value without notice shall be conclusive evidence of shipment against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, provided that he may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or holder, or some person under whom the owner claims. [It has been held that this section does not estop an owner who has not personally signed the bill of lading. Jessel v. Bath, L. R. 2 Ex. 267; 36 L. J. Ex. 149; M'Lean v. Fleming, L. R. 2 H. L. Sc. App. 128; Blanchet v. Powell's Llantwit Collieries Co., L. R. 9 Ex. 74; 43 L. J. Ex. 50; Brown v. Powell Coal Co., L. R. 10 C. P. 562; 44 L. J. C. P. 289.

See as to the negotiability of a bill of lading after the landing of the cargo at the port of destination, *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; 39 L. J. C. P. 187.]

A factor to whom a pledge was consigned, stood in a different position from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading. For, though he might bind his principal by a sale thereof, he could not by a pledge, that not being within the usual scope of his authority. Martin v. Coles, 1 M. & S. 140; Shipley v. Kymer, Ibid. 484; Newsom v. Thornton, 6 East, 17 [and see Thackrah v. Hardy, 25 W. R. 307].

But by statutes 4 Geo. 4, c. 83, 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39 [and 40 & 41 Vict. c. 39] usually called the Factors' Acts, the law upon this subject was altered. [As to sect. 1 of 6 Geo. 4, c. 94, which does not deal directly with the subject of this note but with the position and authority of persons intrusted with *goods* and of persons in whose names goods shall have been shipped, see *Mildred v. Maspons*, 8 App. Ca. 874, per Lord Blackburn.]

By sect. 2, a person *intrusted with*, and in possession of any bill of lading, is to be deemed the true owner of the goods described in it, so far as to give validity to any contract made by him, for the sale or disposition of the goods, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money, or negotiable instrument, provided the buyer,

disponee, or pawnee, have no notice by the bill, or otherwise, that he was not the actual book of owner of the zoods. I pon the question who is to be considered at a room object I within the meaning of this so that see these v. Holmes. 2 M. S. Rob. 23; I billies v. Hoth, 6 M. S. W. Coo, H. Holmes. 2 M. S. Rob. 23; I billies v. Hoth, 6 M. S. W. Coo, H. Holmes. 2 M. S. W. Coo, H. M. S. W. Coo, H. Holmes. 2 M. S. W. Coo, H. Holmes. 3 M. S. W. Coo, H. Holmes. S. W. Coo, H. J. C. W. S. W. Coo, J. J. J. C. B. 281, Johns v. V. Crielle Lympus, 3 C. P. D. 32, 47 L. J. C. P. 241, jor. Brannwell, L. J. Who clobopately shows that poisson injusted means "factor or agent intrusted as such." As to the nature of the agency, see to free p. 818; and as to what is a well journey see T. W. W. K. J. W. S. B. Ad. 337

But by sect. 3, if the deposit or pledge be as a scenarity for a new visitor demand, the depositee or pawnee acquires only the same interest in them that was possessed by the person making the deposit or pledge. [See on this section Journal of White with L. R. 2 Le₁ + (22); M_{2} and χ = (6, 10); (4, 11); (4, 12); (4, 13); (4, 14);

As to the 4th seithen, see Burnes v. Semisor, signal

Sect. 5 enacts that any person may accept such goods or document as aforesaid, on deposit or pledge, from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but in such case he shall acquire such interest, and no further or other, as was possessed by the factor or agent at the time of the deposit or pledge; and, therefore, in this last case, if the agent's interest back feasible so is the pledge is Record with Allen, Dans at Lloyd 22: I as here I had, The action. The agent are cannot be upheld as a pledge under this section. Thempson v. Farmer, 1 M. & M. 48

The provisions of this statute (6 Geo. 4, c. 94), being found insufficient to meet the wishes or convenience of merchants, stat. 5 & 6 Vict. c. 39, " An act to amend the law relating to advances in a fifth made to agents intrusted with goods," was passed (30th June, 1842).

The 1st section, after reciting inter alia, that by 6 Geo. 4, c. 94, "validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merch indize, and consignee making advances to persons abroad who are intrusted with any goods and merchandize are entitled, under certain circumstances, to a lien thereon, but under the said act and the present state of the law, advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only;" and that "advances on the security of goods and merchandize had become an usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to band fide advances upon goods and merchandize as by the 6 Geo. 4, c. 94, is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the 6 Geo. 4, c. 94, or otherwise, would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bond fide made on the security thereof; " and that " much litigation had arisen on the construction of the 6 Geo. 4, c. 94, that it did not extend to protect exchanges of securities bono fide made, and so much uncertainty existed in respect thereof, that it was expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain

basis;" enacts "that from and after the passing of this act any agent who shall hereafter be intrusted with the possession of goods" [Freeman v. Appleyard, 32 L. J. Exch. 175], "or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonû fide made by any person with such agent so intrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

This, as well as the other provisions of the statute, though wide enough in terms to include many other cases, has been limited in construction to mercantile transactions. So that in Wood v. Roweliffe, 6 Hare, 191, where it was contended that advances made upon the security of furniture in a furnished house, not in the way of trade, to the apparent owner of the furniture, who in fact was an agent intrusted with the custody of it by the true owner, were within the protection of 5 & 6 Vict. c. 39, Sir James Wigram, V.-C., held the contrary, saying in the course of his judgment: "the first act (6 Geo. 4, c. 94), is for the 'protection of the property of merchants and others,' and the property referred to is 'goods, wares, and merchandize,' intrusted to the agent 'for the purpose of consignment or sale,' or 'shipped';" [see the first section of the act;] "and upon a judicial construction of the act it has been held that the generality of the expressions must be restricted. Every servant of the owner of goods employed in the care or carriage of such goods, is in one sense 'an agent intrusted with goods,' but still he is not an agent within the meaning of the statute; Monk v. Whittenbury, 2 B. & Ad. 484. The title of the second act (5 & 6 Vict. c. 39) is more general; but it appears to me to relate to 'agents,' and to 'goods and merchandize,' in a sense which is not applicable to the agency or the property in this case."

In Monk v. Whittenbury, supra, it was considered that a carrier, warehouseman, packer, or wharfinger is not "an agent," within 6 Geo. 4, c. 94; and Sir James Wigram, V.-C., appears to have treated that decision as applicable also to the construction of 5 & 6 Vict. c. 39.

[In Lamb v. Attenborough, 1 B. & S. 831; 31 L. J. Q. B. 41, a wine-merchant's clerk was held not to be his "agent" within the meaning of the Factors Acts, but only his servant; but in Hayman v. Flewker, 13 C. B. N. S. 519; 32 L. J. C. P. 132, a person intrusted with pictures for sale on commission, and whose ordinary business did not extend to selling on commission, was held to be an "agent" within 5 & 6 Vict. c. 39, s. 1, as his employment on the occasion corresponded with that of a factor. In the two cases of Johnson v. Crédit Lyonnais Co. and Johnson v. Blumenthal, 3 C. P. D. 32, 47 L. J. C. P. 241, the Court of Appeal affirmed two judgments of Denman, J., and Field, J., in which those learned judges respectively held that a vendor who had been left by his vendee in possession of documents of title to goods till it suited the convenience of the buyer to accept delivery, could not under the Factors Acts confer a good title upon a bona fide pledgee. These judgments, though clearly in accordance with previous decisions, created some consternation amongst commercial men, and led to the passing of another Factors Act, 40 & 41 Vict. c. 39, whereby it is provided (sect. 3) that "where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal acts as amended by this act, so continuing or being in possession shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold."]

In Jenkens v. Usborne, 8 Scott, N. R. 505; 7 M. & G. 678, S. C., confirmed by Van Casterly, Booker 2 Exch 691, a vendee who had received from the vendor a delivery order for the goods was considered not to be a person intrusted with a delivery order within the 6 Geo. 4 c. 94 s. 2, so as to be capable of making a valid pledge of the delivery order, and so defeating the right of stoppage in transitu. | But the law in this respect also has been altered by the last Factors Act, 40 & 41 Vict. c. 39, which provides (sect. 4) " that where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possessbur of the documents of title thereto from the vendor or his agents, any sale, picige, or dispusition of such goods or documents by such vendee so in possession, or by any other person or agent intrusted by the vender with the cocuments within the meaning of the principal acts as amended by this act shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods." In Josephey, W. M. Cab & El 262, it was held by Hudoleston, B., that a mortgagor in possession, with power to sed on his own account, did not come within the Factors Acts.

Questions of nicety have arisen as to how far it is necessary that the agent at the time when he pledges the goods should be intrusted with the goods for the purpose of sale.

In Baines v. Serainson, I. B. & S. 270, the transaction was held protected, though the instructions given to the agent were, "We send you (the factor) the goods for the purpose of effecting this sale which we shall ratify and approve through you, and we intrust you with the possession of the goods to see if they answer the description we have given." The agent in that case was by trade a factor.

In Fuentes v. Montis. L. R. 3 C. P. 268; 37 L. J. C. P. 137, the subject is elaborately discussed in the judgment of Willes. J. It was there held that the agent must be intrusted for the purpose of or in connection with the sale, and, therefore, that where the power of sale had been revoked at the time of the pledge, the transaction was not protected. This decision was upheld in the Exchequer Chamber, L. R. 4 C. P. 93; 38 L. J. C. P. 95. (It should be observed, however, as regards revocation, that by 40 & 41 Vict. c. 39, s. 2, it is provided that "where any agent or person has been intrusted with and continues in the possession of any goods or documents of title to goods within the meaning of the principal acts as amended by that act, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who without notice of such revocation purchases such goods, or makes advances upon the title or security of such goods or documents.")

Notwithstanding a dictum of Lord Westbury in Vickers v. Hertz, L. R. 2 Sc. App. 113, the decision in Fuentes v. Montis was followed by the Court of C. P. in Cole v. The N. W. Bank, L. R. 9 C. P. 470, where it was vainly contended that the omission of the words "intrusted for sale" and "consignment for sale" in 5 & 6 Vict. c. 39, ss. 1, 4, altered the law upon this point, as it existed under the previous statutes. That case was affirmed on appeal to the Exchequer Chamber, L. R. 10 C. P. 354, 44 L. J. C. P. 233, and has since been followed in the important case of Johnson v. Crédit Lyonnais Co., 2 C. P. D. 224; 3 C. P. D. 32; 47 L. J. C. P. 241, and also in Hellings v. Russell, 33 L. T. N. S. 380, where Lord Justice Brett says, "The question is, Did the agent carry on a commercial agency business of the nature of a factor?" The decision in Cole v. North Western Bank comes to this: that an agent who can pledge or sell must be an agent of that class which, like factors, have a business which, when carried to its legitimate result, would properly end in selling or in receiving payment for goods. Per Lord Blackburn, City Bank v. Barrow, 5 App. Ca., at p. 678.

For the purposes of the acts the fact of the goods having been obtained from the principal by fraud is immaterial. Sheppard v. The Union Bank of London, 7 H. & N. 661; 31 L. J. Ex. 154.]

The 2nd section [of 5 & 6 Vict. c. 39] authorises the substitution of other goods, documents of title, or negotiable securities for those first deposited in consideration of a previous advance; but provides that the lien acquired upon the substituted property shall not exceed the then value of the property given up. The decision which pointed out the necessity for that section was Bonzi v. Stewart, 4 M. & G. 525, 5 Scott, N. R. 1, S. C. [See upon the construction of it, Sheppard v. Union Bank of London, 7 H. & N. 661.]

Sect. 3 provides and enacts that the act shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made bonâ fide, and without notice that the agent making such contracts or agreements is acting without authority or mala fide against the owner; that "it shall not be construed to extend to or protect any lien or pledge for an antecedent debt;" [Jewan v. Whitworth, L. R. 2 Eq. 692; Macnee v. Gorst, L. R. 4 Eq. 315; Kaltenbach v. Levis, 10 App. Ca. 617; a sale for an antecedent debt was held good, Thackrah v. Fergusson, 25 W. R. 307] — "nor to authorise any agent in deviating from any expressed order or authority received from the owner - but that, for the purpose and to the intent of protecting all such bonû fide loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods." It has been held upon the construction of this section, that notice that the factor had the goods for sale was not of itself notice that he had no authority to pledge. Navulshaw v. Brownrigg, 21 Law J. Chanc. 57, Vice-Chancellor. (Lord Cranworth), Ibid. 908, [2 De G. Mac. & G. 441,] on appeal, Lord Chancellor (Lord St. Leonards). [As to the proper mode of putting the question of notice to a jury, see Gobind v. Chunder Sein, app., Valentine Ryan, resp., 9 Moore, Ind. App. 140; 5 L. T. N. S. 559, S. C.]

By the 4th section "any bill of lading, India warrant, dock warrant, ware-house keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by indorsement

or briddlesses, the possessor of such document to transfer or receive goods thereby represented, shall be decrared and taken to be a control of the within the meaning of this jet - and any agent initiated as aforested, and possessed of any such document of title whether derived councillately from the owner of such goods or obtained by reason of such a, mys having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been at the with the possession of the goods represented by such document of title as afor sidd . This legislative interpretation of the word "intrusted" was rendered necessary by the decisions in Phillips v. Huthers M. a. W. 500, and Houting v. Phillips, 9. M & W 647; athroned in the H of Lords, H M & W 612; Cf Cl & Fin 543. S. C., that a factor intrusted with a bill of lading, and who, by reason of having the bill of lading, was enabled to and did (but not in pursuance of the instructions of his principal) possess himself of a dock warrant, was not to be considered a person intrusted with the dock warrant within the meaning of 6 Geo. 4, c. 94: [see the distinction between intrusting with and enabling to obtain possession of, illustrated by Crompton, J., in Baines v. Significant 4 Box 8 2.5 and July 10 v v v 2 2 1 L may 1 C. P. D. 32 47 L. J. C. P. 244 per Binorwell, L. J.) = And and contracts recommender of summer of then up to each diverge at at title as atterested shall be contained and taken to be respectively the this of and three approach; and to wind a the same relates "-" And such agent shall be demued to be passess d of such goods or docaments, whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on his behalf:"-And "where any loan or advance shall be bond flde made to any agent intrusted with and in cossession of any such goods or documents of title as aforesaid, on the faith of age contact a many must be so that to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this act, thou he single of any beamouts of the shall not actually be reset of by the person such that the for some layer to I the pariod subsequent thereto: " - (This enactment may have sprung from the inclination of opinion expressed upon the second point argued but not decided, in Bonzi v. Stewart, I.M. & G. 295; 5 Scott, N. R. L. See also Parties v. Tetley, L. R. 5 Eq. 140; Coh v. V. W. Bonk, sup. 1 - And many contract or agrees ment, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent: " - And " any payment made, whether by movey or balls of exchange or other negotiable security, shall be deemed and taken to be an advance within the meaning of this act:" - " negotiaide security," that is, for the payment of money, semble, Taylor v. Kymer, 3 B. & Ad. 320; and although the words are any payment, yet with reference to the object of this act they must be construed to mean any payment by way of long or advance, and not to include a case where the real object of the parties is not a loan or advance, such as was Learnyd v. Robinson, 12 M. & W. 745, where the factor, being liable with the defendant on a bill of exchange, obtained a sum of money from the defendant to take up the bill, at the same time depositing with him the plaintiff's goods. In that case the direction of the judge, Coltman, J., to the jury to find for the plaintiff if they considered what was done to be "only a circuitous mode

of paying the bill on which the defendant was liable," was upheld by the Court of Exchequer.—And "an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.

The 5th section provides that nothing in the act contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract or non-fulfilment of his orders or authority.

[The 6th section has been repealed by 24 & 25 Vict. c. 95, but, with some alteration, re-enacted by an act consolidating and amending the statutes relating to larceny and like offences, viz., 24 & 25 Vict. c. 96, by the 78th section of which a factor or agent exercising the powers virtually conferred upon him by [5 & 6 Vict. c. 39] malâ fide, and without the authority of his principal, [is] subject to punishment by [penal servitude or imprisonment, as for a misdemeanor, unless where the property dealt with is not made a security for or subject to the payment of any greater sum of money than the amount which at the time was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent: or [by s. 85 of the 24 & 25 Vict. c. 96] unless he shall, previously to his being [charged with the offence], have disclosed it, [R. v. Skeen, 1 Bell, C. C. R. 97; 28 L. J. M. C. 91] on oath, in consequence of compulsory process in any proceeding bona fide instituted by any party aggrieved, or in an examination or deposition before any court of bankruptcy or insolvency.

Sect. 7 [of the 5 & 6 Vict. c. 39] preserves the right of the owner to redeem, and enables him to prove under the bankruptcy of the agent for the amount paid to redeem, or the value of, the goods. [See on this section, *Kaltenbach* v. *Lewis*, 10 App. Ca. 617, 55 L. J. Ch. 58.]

The 8th section is the common interpretation clause, and the 9th and last excludes a retrospective application of the provisions of the act.

This act, 5 & 6 Vict. c. 39, it may be observed, relates to *advances* upon the security of goods, and it will still be necessary to resort to the 2nd and 4th sections of 6 Geo. 4, c. 94, in cases not falling within that category.

Stoppage in transitu. — The right of stoppage in transitu, says Chief-Justice Shaw in Rowley v. Bigelow, 12 Pick. 313, is nothing more than an extension of the right of lien, which by the common law the vendor has upon the goods for the price, originally allowed in equity and subsequently adopted as a rule of law. See, also, Stubbs v. Lund, 7 Mass. 453, 9 Mass. 65; Schofield v. Bell, 14 Mass. 40; Stanton v. Eager, 16 Pick. 467; Babcock v. Bonnell, 80 N. Y. 244; Newhall v. Vargas, 15 Me. 314; Ludlow v. Bowe, 1 Johns. 16, 5 Denio 629. When, by the terms of the sale, the price is to be paid on delivery, the vendor has a right to retain the goods till payment is made. But when the

yendor and vendee are at a distance from each other, and if, while the goods are on the way from the vendor to the vendee, the latter becomes insolvent and the vendor can repossess himself of the goods before they reach the vendee, he has a right to do so, and thereby regain his lien; Rowley r. Bigelow, uhi supra.

The general doctrine of the decisions on this branch of the law is, that the right depends solely upon the *insolvency* of the yendor. But the term insolvency in this connection denotes more than merely having taken the benefit of an insolvent or bankrupt law; it also includes a failure to pay his debts as they become due, or his inability to pay for the goods, if he was to pay on delivery; Rogers r. Thomas, 20 Conn. 54, 123 Mass. 12; Thompson r. Thompson, 4 Cush. 127; Lee r. Kilburn, 3 Gray 594; Herrick r. Borst, 4 Hill 650; Chandler r. Fulton, 10 Texas 2; Atkins r. Colby, 20 N. H. 154; Nayler r. Dennie, 8 Pick. 198; Hays r. Movoille, 14 Penn. 51; Secombe r. Mill, 14 B. Monroe 324.

In Rogers v. Thomas, ubi supra, it was held that it was essential to the right of stoppage in transitu, that the insolvency should intervene between the time of sale and the exercise of the right of stoppage. But this is not the prevailing doctrine of the American cases; Benedict v. Schaettle, 12 Ohio 515; 1 Disney 445; O'Brien v. Norris, 16 Md. 122; Loeb v. Peters, 63 Ala. 243; Blum v. Marks, 21 La. Ann. 268; Reynolds v. B. & M. R. Co., 43 N. H. 580. If the vendee was insolvent at the date of the sale, but the vendor did not discover it till afterwards, his right of stoppage remains; Benedict v. Schaettle, 12 Ohio 515; Gustine v. Phillips, 38 Mich. 675 & 390; Blum v. Marks, 21 La. Ann. 268; Schwabacker r. Kane, 13 Mo. App. 126; Bender v. Bowman, 2 Pearson (Pa.) 517; More v. Lott, 13 Nev. 380; White r. Welsh, 38 Pa. St. 396. It is not necessary to show that the price for the goods is due and payable; Clapp v. Sohmer, 55 Iowa 273.

The right of stoppage in transitu does not exist where the goods are consigned to a creditor of the consignor in payment of the debt of the consignor; Clark v. Mauran, 3 Paige (N. Y.) 373; Wood v. Roach, 1 Yeates (Pa.) 177. Nor does the right exist against a bonâ fide indorsee of a bill of lading for value; Dows v. Perrin, 16 N. Y. 325. See Summeril v. Elder, 1 Binn. 106; Eaton v. Cook, 32 Vt. 58.

Continuance of the right. - The right continues so long as the goods are in the possession of the carrier as such, and so long as they remain in any place of deposit connected with their transmission; 2 Kent Com. 544-5; Buckley v. Stickney, 15 Wend. 137, 23 Wend. 611; White v. Mitchell, 38 Mich. 390. It was held in Sawyer v. Joslin, 20 Vt. 172, that the right ceases whenever the goods, in pursuance of the original destination given them by the consignor, have come into either the actual or constructive possession of the consignee; Becker v. Hallgarten, 86 N. Y. 167. A delivery of the goods to forwarding agents, employed by the vendee to remain with them until the vendee should send orders respecting their destination, was, in legal effect, a delivery to the vendee, the transitus complete, and the right to stop the goods was terminated. But if the goods, at the time they were delivered to the forwarding agents, were destined to a foreign port, under an assignment already made, and the goods were to be forwarded to their destination without any further orders from the vendee, the transitus was not ended when the goods came into the possession of the forwarding agents, but continued until the goods reached their final destination; Biggs v. Barry, 2 Curtis 262; Cobeen v. Campbell, 30 Penn. 254.

Goods were sold by marks and numbers, lying in the vendor's warehouse on six months' credit; and it was a part of the consideration of the purchase that they might lie, rent free, in the warehouse, at the option of the vendee and for his benefit, till the vendor should want the room. *Held*, the delivery was complete, and the right of stoppage at an end; Barrett v. Goddard, 3 Mason 107. See also Bradford v. Morbuy, 12 Ala. 520.

The right of stopping goods shipped on the credit and at the risk of the consignee continues until they come into his actual possession at the end of the voyage, unless he shall have sold them previously bonâ fide, and indorsed the bills of lading to the purchaser; Stubbs v. Lund, ubi supra; Ilsley v. Stubbs, 9 Mass. 71-4, 16 Pick. 467; Arnold v. Delano, 4 Cush. 33, 8 Cranch 418; Grant v. Hill, 4 Gray 361; Rowly v. Bigelow, ubi supra. See Bolin v. Huffnagle, 1 Rawle (Pa.) 9; Castanola v. Missouri Pacific R. Co., 24 Fed. Rep. 267. The same rule, says Ch. J. Parsons, in Stubbs v. Lund, must govern, if the consignee be the shipowner sed quære. See Abbott on Shipping, 5 ed. 394, and Rand's note (d), 9 Mass. pp. 71-2, 13 Me. 93.

Goods shipped on board a vessel are still in transity after the arrival of the vessel at the port of destination, until they are taken possession of by or on behalf of the assignee; Nayler v. Dennie, 8 Pick, 198.

An attachment of goods so situated as the property of the consignee, will not defeat the consignor's right to stop them; Mason r. Wilson, 43 Ark. 172; Seymour r. Newton, 105 Mass. 272; C. B. & Q. R. Co. r. Painter, 15 Neb. 394. But if the vendor attaches the goods while in transit, as the property of the vendee, his right of stoppage in transity ceases; Woodruff r. Noyes, 15 Conn. 335; Hiller r. Elliott, 45 N. J. L. 564, 60 Tex. 373; Inslee r. Lane, 57 N. H. 454; Mississippi Mills r. Union & Planters' Bank, 9 Lee (Tenn.) 735; Sherman r. Rugee, 55 Wis, 346.

The vendee, acting in good faith, may intercept the goods before they reach their destination, and, by taking actual possession of them, defeat the vendor's hen; Mohr r, B, & A, R. Co., 106 Mass, 72. But the interception must be in good faith; Poole r, Houston, &c., R, Co., 58 Tex. 134. See Brooke Iron Co. r, O'Brien, 135 Mass, 447. If the vendee intercept the goods on their passage to him, and take possession as owner, the transitus is at an end; 2 Kent Com. 547; Jordan r, James, 5 H, (Ohio) 88; Wood r, Yeatman, 15 B, Mon. 270. But a demand for the goods made by the vendee upon the carrier, with which he does not comply, does not terminate the vendor's right of stoppage; Jackson r, Nichol, 5 Bing, (N. C.) 508.

A common carrier, who surrenders the possession of goods, entrusted to him for carriage, to an officer who attaches upon a legal process against the consignee, is not liable to the consignor, after notice to him to hold the goods, for not notifying the officer or taking steps to stop the goods in transitu; French v. Star Union Trans. Co., 134 Mass. 285. But the carrier is liable if he delivers the goods to an officer who attaches them on a writ against a person not the owner; Edwards v. White Line Transit Co., 104 Mass. 159. The stopping of goods in transitu does not rescind the contract of sale; Grant v. Hill, 4 Gray 361; Newhall v. Vargas, ubi supra; Rowly v. Bigelow, ubi supra, 16 Pick. 475; Chandler v. Fuller, 10 Texas 2; Rogers v. Thomas, 20 Conn. 53; Babcock v. Bonnell, 80 N. Y. 244; Potter's App., 45 Penn. 151.

The vendor does not take possession of the goods as his own,

but as those of the vendee and upon due notice and time he may resell the goods and apply the proceeds of the sale in part payment and sue the vendee for the balance; 2 Kent Com. 541, 15 Me. 314; Howatt v. Davis, 5 Munf. (Va.) 34; House v. Judson, 4 Dana (Ky.) 10.

If the consignee dies, his personal representative, may, on the arrival of the goods, take possession and so terminate the transit; Conyers v. Ennis, 2 Mason 236.

The consignor's right of stoppage in transitu is not defeated by the assignee's accepting bills for the value of the goods; Bell v. Moss, 5 Wharton (Pa.) 189; Donath v. Broomhead, 7 Barr. 310; Newhall v. Vargas, ubi supra, see 9 Mass. 65. Nor is the consignor's right defeated by the payment of part of the price, by the assignee. See Peters v. Ballister, 3 Pick. 495. But where goods are sold bonâ fide while in transit, by assignment of the bill of lading, the right of the original vendor to stop the goods in transit ceases; Walter v. Ross, 2 Wash. 283; Lee v. Kimball, 45 Me. 172; Haggerty v. Palmer, 6 Johns. 437; Boyd v. Mosely, 2 Swan (Tenn.) 661. See Andenreid v. Randall, 3 Cliff. 99. But an assignment by the vendee to pay his debts will not affect the right of stoppage in transitu; Harris v. Hart, 6 Duer (N. Y.) 606.

It is not necessary that the vendor should obtain actual possession of the goods, but is sufficient if he give notice of his claim to the person in whose custody they are during the transit; Mottram v. Heyer, 5 Denio 629; Bell v. Moss, ubi supra.

In Grant v. Hill, 4 Gray 367, Ch. J. Shaw says: "What amounts to a stoppage in transitu, in a particular case, may be a question of difficulty. But if the vendee finding he shall not be able to pay for the goods, gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor on such notice assents to it, that is a good stoppage in transitu.

The question as to when the transit begins and ends is considered in the cases; Thompson v. B. & O. R. Co., 28 Mo. 396; Mohr v. B. & A. R. Co., 106 Mass. 67; Brooke Iron Co. v. O'Brien, 135 Mass. 442; Hall v. Deamond, 63 N. H. 565; Durgy Cement & Umber Co. v. O'Brien, 123 Mass. 14; Harris v. Pratt, 17 N. Y. 249; Muskegan Booming Co. v. Underhill, 43 Mich. 629; Bunn v. Valley Lumber Co., 51 Wis. 376. The right of stoppage ceases when the entry of goods in a bonded

warehouse is perfected; Cartwright r. Wilmerding, 24 N. Y. 521; Frazer r. Hilhard, 2 Strobh. (S. C.) 309. See Hoover r. Tibbets, 13 Wis. 79; Parker r. McIver, 1 Desau. (S. C.) 274; Gilford r. Smith, 30 Vt. 48; Blackman r. Pierce, 23 Cd. 508; Aguirre r. Parmelee, 22 Conn. 473. But if the goods be in a public store, awaiting the completion of the entry, the consignor's right to stop them in transit continues; Western Trans. Co. r. Hawley, 1 Daly (N. Y.) 327. See Clapp r. Peck, 55 Iowa 270. If the transit is once at an end, it cannot commence again, because the goods are sent to a new destination; Pattinger r. Hecksher, 2 Grant (Pa.) 309.

Where the consignee agreed with the carrier to set the goods aside in its depot to be sold, to pay past due freights and pay the balance to the assignee, it was held this was not such a delivery to the assignee as to defeat the consignor's right of stoppage in transitu; Macon & Western R. R. r. Meador, 65 Ga. 705. After goods have been sold by the vendee in good faith and by the carrier delivered to his vendee, the original vendor's right of stoppage in transitu is gone. United States Wind Engine, &c., Co. v. Oliver, 16 Neb. 612.

Goods may be stopped in transitu after their arrival at the carrier's warehouse, and there awaiting payment of the freight; Symns v. Schotten, 35 Kan. 310; Harding Paper Co. v. Allen, 65 Wis. 576.

By, and against whom, and how the right may be exercised is discussed in the following cases; Newhall v. Vargas, ubi supra; Seymour v. Newton, 105 Mass. 275; 5 Daly 476; Mullen v. Pander, 55 N. Y. 325; Hays v. Monille, 14 Penn. 48; Gustine v. Phillips, 38 Mich. 674; Reynolds v. B. & M. R. Co., 43 N. H. 324; Roche v. Donovan, 13 Kans. 251.

A creditor of an insolvent vendee cannot, by paying the freight on the goods and attaching them, defeat the vendor's right to stop them in transitu; Greve r. Dunham, 60 Iowa 108. When one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods in transitu, because his principal owes him for money advanced in the purchase of the goods; Gwyn v. Richmond & Danville R. Co., 85 N. C. 429.

MASTER v. MILLER.

TRINITY. - 3 GEO. 3, K. B. & CAM. SCACC.

[REPORTED 4 T. R. 320 AND 2 HEN. BL. 140.]

An unauthorized alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration (a).

[But see now the Bills of Exchange Act, 1882, s. 64, post in notis.]

The first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel and Co., on the 20th of March, 1788, drew a bill for 974l. 10s. on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that Peel and Co., on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson and Cooke, for 974l. 10s., "which said bill of exchange, made by the said Peel and Co., as the same hath been altered, accepted, and written upon, as hereinafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following; to

⁽a) See *Hutchins* v. *Scott*, 2 M. & W. 809, where an agreement which had been altered while in the custody

of the person producing it was held admissible in evidence for some purposes.

wit, June 23rd, 974/. 10s., Manchester, March 20, 1788, three months after date pay to the order of Messrs. Wilkinson and Cooke, 974. 10s., received, as advised, Peel, Yates, and Co. To Mr. Cha. Miller, C. M. 23rd June, 1788. That Peel and Co. delivered the said bill to Wilkinson and Cooke, which the defendant afterwards and before the alteration of the bill hereinafter mentioned accepted, that Wilkinson and Cooke afterwards indorsed the said bill to the plaintiffs for a valuable consideration before that time given, and paid by them to Wilkinson and Cooke for the same. That the said bill of exchange, at the time of making thereof and at the time of the acceptance, and when it came to the hands of Wilkinson and Cooke, as aforesaid, bore date on the 26th day of March, 1788, the day of making the same; and that after it so came to and whilst it remained in the hands of Wilkinson and Cooke, the said date of the said bill, without the authority or privity of defendant, was altered by some person or persons to the jurors aforesaid unknown, from the 26th day of March, 1788, to the 20th day of March, 1788. That the words "June 23rd," at the top of the bill, were there inserted to mark that it would become due and payable on the 23rd of June next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23rd of June, and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days respectively he refused to pay." The verdict also stated that the bill so produced to the jury and read in evidence was the same bill upon which the plaintiffs declared, &c.

This case was argued in Hilary Term last, by Wood for the plaintiffs, and Mingay for the defendant; and again on this day by Chambre for the plaintiffs, and Erskine for the defendant.

For the plaintiffs it was contended that they were entitled, notwithstanding the alteration in the bill of exchange, to recover, according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and

had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those instruments and bills of exchange; but upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills: and if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in Pigot's Case (a), where most of the authorities are collected; from thence it appears, that if a deed be altered in a material point, even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party in whose possession it was lodged, should, on account of its superior authenticity, be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger; and that he is the better enabled to do from the nature of the instrument itself, which, not being of a negotiable nature, is not likely to meet with any mutilation, unless through the fraud or negligence of the owner; whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees, who are ignorant of the form in which they were originally drawn or accepted; and the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons upon which the decisions of

the courts upon deeds have been grounded, will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a protect in curiam (a), unless, as in Real v. Brockman (t), it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into court for the purpose of inspection; and if, as is said in 10 Co. 92, b, the judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now, as that was the reason why a deed was required to be pleaded with a profest, and as it never was necessary to make a profest of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be suspicious, 13 Vin. Abr. tit. Faits, 37, 38; Bro. Abr. Faits, pl. 11, referring to 44 Edw. 3, c. 42. Yor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in Moore, 35, pl. 116, a deed which had been rased was held void, although the party himself who made it had made the erasure; which was permitting a party to avail himself of his own fraud: but it is impossible to contend that the rule can be carried to the same extent as to bills; nor is it denied but that if the blot here had been made by the acceptor himself, he would still have been bound. In Keilw, 162, it is said that if A, be bound to B, in 20%, and B, rase out 10%, all the bond is void, although it is for the advantage of the obligor; and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it, 2 Rol. Abr. 29, letter U., pl. 5 (Lord Kengon observed that there had been decisions to the contrary since). Fraud could not be the principle on which those cases were determined; whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it, 2 Rol. Abr. 29, pl. 6; and it does not abate the force of the argument that the law is relaxed in these respects, even as to deeds, for

 $⁽a) \ \ [\text{Not so now}; \ \text{C. L. P. Act. } 1852, \, \text{s. } 55 \, ; \ \text{St. Law Rev. Act. } 1883, \, \text{s. } 6.]$

⁽b) 3 T. R. 151.

the question still remains, whether at any time bills of exchange were construed with the same rigour as deeds? The principle upon which all these cases relative to deeds were founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity; and as the party who had possession of the deed was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the court; as in 1 Rol. Rep. 40, which is also cited in Pigot's Case, 11 Co. 27, and Michael v. Scockwith, Cro. El. 120, in both which cases the alteration was after plea pleaded; and on that ground the court held it was still to be considered as the deed of the party on non est factum. Now the form of the issue in actions upon deeds and those upon bills is very different; in the one case, the issue simply is, whether it is the deed of the party which goes to the time of the plea pleaded? as appears from the case before cited, and from 5 Co. 119, b, and Dy. 59; but here the issue is, whether the defendant promised at the time of the acceptance, to pay the contents? The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count: and in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case, do not exist in the other. On the contrary, all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of Minet v. Gibson (a) goes much farther than the present: for there this Court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties; although such circumstances operated to establish a different contract from that which appeared upon the face

⁽a) 3 T. R. 481, in B. R., and 1 H. Bl. 569, in Dom. Proc.

of the bill itself; whereas the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill, non constat upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is indersed or delivered for a valuable consideration. In Miller v. Race (a), where a banknote had been stolen, and afterwards passed bond fide to the plaintiff, it was held that he might recover it in trover against the person who had stopped it for the real owner. And the same point was held in Peacock v. Rhodes (b), where the bill was payable to order. Again, in Price v. Neale (v), it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now if it be no answer to an action upon a bill against the acceptor to show that it was a forgery in its original making by a third person's having feigned the handwriting of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect, even by strangers to it; which shows that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in Russell v. Langstaffe (d) the Court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks, which he had entrusted to another, was liable to an indorsee for the sums of which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn before the indorsement. But the case which is most immediately in point to the present, is that of Price v. Shute, E. 33 Car. 2 in B. R. (e);

⁽a) 1 Burr. 452.

⁽d) Dougl. 514.

⁽b) Dougl. 633.

⁽e) 2 Moll. c.10, s. 28.

⁽c) 3 Burr. 1354.

there a bill was drawn payable the 1st of January; the person upon whom it was drawn accepted it to be paid the 1st of March; the holder, upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March, and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused; whereupon the payee struck out the 1st of January, and put in the 1st of March again; and in an action brought on this bill, the question was, whether these alterations did not destroy it; and it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognised, as far as general opinion goes, by having them inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise: for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it, even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents, upon the same principle as governed the case of Read v. Brookman (a)? where it was held that pleading that a deed is lost by time and accident, supersedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of Tatlock v. Harris (b); for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant it was contended, that the broad principle of law was, that any alteration of a written instrument in a material part thereof, avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only because formerly most written undertakings and

obligations were in that form. This primuple of law was founded in sound sense; it was calculated to prevent trand, and determen from tampering with written securities; and it would be directly repugnant to the padicy of such a law to permit the holder of a bill to attempt a traud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds where found was not so likely to be practised. The principle laid down in Pigot's Case (a) is not disputed as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is sui generis, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on? and therefore any matter which either avoids it ab initio, or goes in discharge of it, may be shown as much in the one case as in the other. Upon non est factum the question is, whether in law the deed produced in evidence be the deed of the party? so on non assumpsit the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant? because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now neither of the counts in the declaration was proved by the facts found. For in the first count the bill is dated the 20th of March; but as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither

can they recover on the second, because though it is found that he accepted a bill dated the 26th of March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly in the case of Minet v. Gibson, the same answer may be given to all of them, which is, that so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party who, in the latter case particularly, endeavoured by a trick to evade the contract: whereas here the contract has been substantially altered by the parties who endeavoured to enforce it; or at least by those whom they represent, and from whom they derive title. Then the case in Molloy, of Price v. Shute, is chiefly relied on, by the plaintiffs; to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost; because in that there is no fraud. But even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration; upon which ground the case of Tatlock v. Harris was decided.

In reply it was urged, that the issue was not whether the defendant had accepted this bill in the state in which it was shown to the jury, but whether he had promised to pay, in consequence of having accepted a bill dated the 26th March,

drawn by ' &c.; and those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange which have been altered as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed; and it is admitted, that if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favour of the plaintiffs, it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do. And if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from Molloy: for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the court in which it was determined, and the time of the decision; and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

Lord Kenyon, C. J. — The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument? — for the instrument is the only means by which they can derive a right of action. The right of action which subsisted in favour of Wilkinson and Cooke, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in Molloy, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited

at the bar, which, in point of law, as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanour: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanour, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then entitled to the amount of it; and from whom the plaintiffs derive title; and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were of all deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they established this principle, that all written instruments which were altered or erased should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in Ward's Case (a), whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to

⁽a) 2 Str. 747, and 2 Lord Raym. 1461.

it. But it was there held that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case inted from Molloy, indeed, at first made a different impression on my mind; but on looking over it with great attention. I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed, accepted it as payable at a different time, and afterwards the payer struck out the enlarged acceptance; and on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party lamself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case; not an iota of the bill itself was altered; but on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least that none is found; but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saving, that a defendant is liable, on non assumpsit, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is, whether or not the defendant promised in the form stated in the declaration? and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

Ashurst, J.—It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much

as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them: at all events, it was their business to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody: then, if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs who derive title under them. For whenever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

Buller, J.—In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands, it is astonishing to me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was

left to them by the Chief Justice to read the bill as it undoubtedly was drawn, and by that means to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was the furtherance of the justice of the case, and it tended to prevent expense, litigation and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Nay, if actual forgery had been committed, the defendant could not be permitted to retain the money: he must not get 9000%, by the crime of another; but, in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, proceeding on principles of public policy, has wisely said - That where a case amounts to felony, you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or tort, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and, unless it be found by the jury, the Court cannot imply it. Minet v. Gibson is a most decisive authority for that proposition, if any be wanted, and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. It has been contended that the party there recovered, because the nature of the obligation was not altered: but the determination did not proceed entirely on that ground, but on this, that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer: so here the

plaintiffs do not attempt to enforce the contract according to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that Peel and Co., on the 26th of March, 1788, drew a bill of exchange on the defendant for 9471. 10s., payable to Wilkinson and Co.: which bill as the same has been altered, accepted, and written upon, is set out in hee verba. Upon the fac-simile copy of the bill set out in the verdiet, there appears to be a blot over the date: and the jury have thought fit to read it as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was something above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill, this must have been either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6: but the jury have found no difficulty in saying it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds that the defendant, before any alteration of the bill, accepted it; and Wilkinson and Co. indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it was stated, that whilst the bill was in the hands of Wilkinson and Cooke, the date, without the authority of the defendant, was altered by persons unknown from the 26th to the 20th of March. They further find that the words "23rd of June" were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiffs. This is the full substance of the special verdict; and there is neither forgery, felony, nor fraud, found or supposed by the jury; we therefore can neither intend nor infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the Court whether the circumstance of a blot being on the bill which we cannot account for makes the bill void. Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child had torn out a bit of the bill on which the top of the 6 is written, is the holder of the bill to loose his 9741.? or is the defendant to get 974l. by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by

degrees. The jury have said that the bill was altered. The word "altered" may ruise a suspicion and abarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it as it is used in the place where we find it. How was it altered, what was the afteration, when was it made, and for what purpose? 'The pury' have said it was altered by means of putting a blot over the date: but by whom or when that was done we don't know, further than that it was done whilst the bill was in the poor sesion of Wilkinson and Cooke: but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding, the Court are bound to say it was done innocently. But the jury have also said, that "June 23rd" was inserted at the top of the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the ball was in the possession of Wilkinson and Cooke? No. It is consistent with the finding, that the plaintiffs, who are found to be bend fide holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "June 23rd" with the most perfect innocence. If the bill had been originally dated on the 20th, the 23rd June would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance shall render the bill yold? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That in some sense of the word is an alteration; for it makes an addition to the bill which was not there when it was drawn or accepted. But was it done fraudulently? The answer is -It was not, and therefore it is of no avail. So here the jury have not said it was done fraudulently, and therefore it affords no objection. When the jury have stated what the alteration is, and how it was made, namely, by making a blot, and having fixed no sinister or improper motive for so doing, it is the same as if they had said only "here is a blot on the bill." Suppose the jury had said in a few words that this bill was drawn, indorsed, and accepted, by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the

20th instead of the 26th. The true answer would have been — Blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place, (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced,) "That the law is best applied when it is subservient to the honesty of the case. And if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of law we must square our conduct." The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can: because they carried conviction to my mind; because they contain my exact sentiments, and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties. I believe there is no such rule. For half a century there have been various cases which have left the question of forgery untouched. If a bill be forged, the acceptor is bound." Speaking of the case of Stone v. Freeland, it was said, "if any one say that a case is not law, let him show why it is not so. Judges can only look to former decisions. This has been a rule in the commercial world above 20 years." This reasoning seems to me to be sound and decisive, if it apply to the present case; and to prove that it does apply, I need only quote the case, mentioned at the bar, of Price v. Shute, reported in Beawes's Lex. Mercat. tit. Bill of Exchange, pl. 222, and Moll. 109. There a bill was payable 1st January, and the person to whom it was directed accepted it to pay on the 1st of March, with which the servant returned to his master, who, perceiving this enlarged acceptance, struck out the 1st of March and put in the 1st of January, and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out the 1st of January and inserted the

1st of March again. In an action brought on this bill, the question was whether these alterations did not destroy the bill; and ruled by Lord Chief Justice Pemberton, that they did not. Now, on reading this case, I cannot consider it in any other light than as an action brought against the acceptor; for it only states what passed between those parties. Here then is a rule which has prevailed in the commercial world for 110 years: it stands uncontradicted and unimpeached: it was decided by great authority; and as, I take it, on deliberation. For when it is said to have been in B. R., that must either have been in this court, or on a case saved by Chief Justice Pemberton for his own opinion: which was a common way of proceeding in those days. In that case the term "alteration" is used, and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment; so it is here. But in one respect that case goes beyond the present; for there the alteration was made by the plaintiff himself; here it was not. It is true, in that ease, when the plaintiff found he could not receive the money on the 1st of January, he altered it back to the 1st of March; but if the first alteration vitiated the bill, no subsequent alteration could set it up against the acceptor without his consent. Here the plaintiffs have not re-altered the bill; but they have acted a more honest part; they have left the bill as it was to speak for itself; but they have treated it as a bill of the 26th of March; they have proved that it was a bill of the 26th of March; they demanded payment according to that date; and the jury have found all these facts to be true. And it is material to consider what was the issue joined between the parties; for there is a great deal of difference between the plea of non est factum and the present: here the question is, whether the drawer made such a bill, and whether the defendant accepted it; and this is found by the jury. Then the case of Price v. Shute, in sense and substance, is a direct authority in point with the present; though it vary in a minute and immaterial circumstance. The plaintiffs in treating the bill, and making a demand as they have done, seem to have followed the sober advice and directions given by Beawes in pl. 190; where he says, "he that is possessor of a bill which only says 'pay,' without mentioning the time when, or that is without a date, or not clearly and legibly written, payable

some time after date, &c., so that the certain precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid." It is impossible that this writer could have supposed that the bill was rendered void by any blot, obliteration, or erasure: on the contrary, he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is Carth. 460, where a bill was accepted after a day of payment was elapsed. It was objected that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and therefore the declaration was bad; but the Court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant having accepted this bill, whatever may be the construction as to the date, must pay the money. I hold that in this case there is no fraud either express or implied; and that, as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that Wilkinson and Cooke did mean a fraud; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our lawbooks, that fraud vitiates everything. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle which I have mentioned is always applied ad hominem. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two others.

Even as between the parties themselves we must not forget the figurative language of Lord Chief Justice Wilmot, who said that "the statute law is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, and makes yold only that part where the fault is, and preserves the rest." 2 Wils. 351. If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. Beawes, tit. Bill of Exchange, pl. 135, says, "where the possessor of a bill payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third, &c., and though the creditors, having discovered the fraud, oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it." But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any crasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds, and there is no authority to support it. In the case of deeds, there must be a profest (a), and, as we learn from 10 Co. 92 b., in ancient times the judges pronounced upon view of the deed, though Lord Coke says that practice was afterwards altered. But there never is a profest of a bill of exchange; the judges cannot determine on a view of that, but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the case of joint and several bonds the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt; but if it were a joint bond, he would be liable to only half or other proportionable part of it. So far in those days did the Court look into the equity of the case. But the blot on this bill is no injury to the defendant; he is not liable to pay till

⁽a) [By the "Common Law Procedure Act, 1852," s. 55, it was made unnecessary to make profert.]

the bill became due, computing the time from the original date; then he must pay it: he alone is liable; and he never can be charged a second time on the bill. Secondly, it is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In Palm. 403, a deed which had erasures in it, and from which the seal was torn, and was held good, it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiff's counsel. And in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon that point, by stating the truth of the case. The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a profert of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it; when that is done, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails. But a profert of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the second count, which is drawn upon the bill, stating it to bear date the 26th March.

But supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recall to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawer's in his hands; and his accepting the bill imports, and is at the least primâ facie evidence, that he had: and on this verdict he must be taken to have the amount in his hands. In Burr. 1675, Aston, J., said, it is an admission of effects. By his acceptance he gave faith to the bill; and the plaintiffs, giving credit to that fact, have actually paid the value of the bill on receiving it. On this case the money paid by the plaintiffs is money paid for the use of the defendant; for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money received by him for the use of the plaintiffs,

who were holders of the bill when it became due. The defendant has got that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in an action for money had and received.

In answer to this, it was in the last term suggested for consideration, whether this bill after the alteration were not a chose in action, which could not be assigned? It is laid down in our old books, that for avoiding maintenance a chose in action cannot be assigned, or granted over to another. Co. Litt. 214 a., 266 a.; 2 Roll. 45, 1, 40 (a). The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case (h). In 2 Roll. Abr. 45 & 46, it is admitted that an obligation or other deed may be granted, so that the writing passes: but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster-hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance (e). Bro. tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpana, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it: 2 Roll.

⁽a) [See a curious passage in Termes de la Ley, tit. Chose in Action.]

⁽b) [The doctrine that there cannot be an assignment of a debt has been long ago exploded. See Noy's Maxims, p. 72; the judgment of Willes, J., in Balfour v. The Sea, Fire, and Life Assurance Co., 3 C. B.,

N. S. 308; and now by the Judicature Act, 1873, s. 25, subs. 6, an assignment in writing with notice to the debtor is effectual in law.]

⁽c) [See the judgment of Lord Abinger, in Finden v. Parker, 11 M. & W. 675, 682; 4 Ken. Comm. 10th ed., 31, note; Williamson v. Henley, 6 Bing. 299.]

Abr. 115; but in the midst of all these doctrines on maintenance. there was one case in which the courts of law allowed of an assignment of a chose in action, and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt it, and therefore they always acted in direct contradiction to it; and we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554, the Court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction and act upon. So an assignment of a chose in action has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29; Sid. 212, and T. Jones, 222; and lastly, by all the judges of England in Mouldsdale v. Birchall, 2 Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted, that though the courts of law have gone the length of taking notice of assignments of choses in action and of acting upon them, yet in many cases they have adhered to the formal objection that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow when the substance is gone; and that it is merely a shadow, is apparent from the latter cases, in which the Court have taken care that it shall never work injustice. In Bottomley v. Brooke, C. B. Mich. 22 G. 3 (a), which was debt on bond, the defendant pleaded that the bond was given for securing 103l. lent to the defendant by E. Chancellor; and was given by her direction in trust for her, and that E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the Court. In Rudge v. Birch (b), K. B. Mich. 25 G. 3 (c), on the same pleadings there was judgment for the defendant. And in Winch v.

them was rather to be restrained than extended. [This is, however, at variance with the pelicy of the Second C. L. P. Act, 1854, and the Judicature Acts.]

⁽a) 1 T. R. 621.

⁽b) But these cases have been disapproved of. Tucker v. Tucker, 4 B. & Ad. 745. And see Wake v. Tinkler, 16 E. 36, where Lord Ellenborough said, that the doctrine laid down in

⁽c) 1 T. R. 622.

Keeley, K. B. Hil. 27 G. 3 (a), where the obligee assigned over a bond and afterwards became a bankrupt, the Court held that he might notwithstanding maintain the action. Mr. J. Ashurst said, "It is true that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust, why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned; but this Court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim there may still be some cases in which an action cannot be maintained by an assignee of a chose in metion in his own name, it remains to be considered, whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In Pillan v. Van Mierop, Lord Mansfield said, if a man agree to do what if finally executed would make him liable, as in a court of equity, so, in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold; that is, in the cases of bills of exchange and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants; so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the Court have allowed it: 1st, In Fenner v. Mears, where the defendant, a captain of an East Indiaman, borrowed 1000l. of Cox, and gave two Respondentia bonds, and signed an indorsement on the back of them, acknowledging that, in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said (a), Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and, therefore, I think, entitled also at law: for the defendant has promised to pay any person who is entitled to the money. So in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is by law bound to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of the plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2ndly, Clarke v. Adair, sittings after Easter, 4 Geo. 3: Debray, an officer, drew a bill on the agent of a regiment payable out of the first money which should become due to him on account of arrears or non-effective money. Adair did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: but Lord Mansfield said that it is an assignment for valuable consideration, with notice to the agent; and he is bound to pay it. He

said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person in whose favour the bill was drawn. - 3rdly, In Israel v. Douglas, C. B. East, 29 G. 3 (a), A. being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due from A. to B.; whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. J. Heath expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man hable for money had and received. This opinion was cited with approbation in the House of Lords in Gibson v. Minet. Listly, I come to the case of Tatlack v. Harris, (3 T. R. 182,) in which Lord Kenyon in delivering the judgment of the court, said it "was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case, without infringing any rule of law." All these cases prove that the remedy will be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Chief Justice Wilmot said in the case I have alluded to, that not only boni judicis est ampliare jurisdictionem, but ampliare justitiam: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of subpana, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs can admit of no question; neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive. For these reasons, I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th; or on the count for money paid: or on the count for money had and received.

Grose, J.—The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th of March; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March; but the defendant objects to the plaintiffs' recovering on this count also. because the bill having been altered while it was in the hands of Wilkinson and Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson and Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at three months' date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days: according to that alteration, the payment was demanded on the 23rd of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel and Co., and accepted by the defendant; and here the cases which were cited at the bar apply. Pigot's is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead non est factum, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, 2ndly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds (a): but it is said

it be not rased or interlined in material points or places, and that the judges in ancient time did judge woon their view

⁽a) In Dr. Leyfield's Case, 10 Rep. 92, one of the reasons for requiring profert of a deed is stated to be that

that that law does not extend to the case of a bill of exchange ; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instrument as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100%, and after acceptance the sum was altered to 1000/.: it is not pretended that the acceptor shall be liable to pay the 1000%; and I say that he cannot be compelled to pay the 100%, according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well as when applied to a bill as to a deed. It was said that Pigot's Case only shows to what time the issue relates: but it goes further, and shows, that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the Court will inquire to what time the issue relates in both cases.

the deed to be void, but of late times have left that to be tried by the jury if the rasing or interlining were before delivery. On similar principles a deed, the name of the grantee in which is introduced after delivery, is void. Hibblewhite v. M'Morine, 6 M. & W.

200. But if the grantee be sufficiently identified, such an addition as filling up a blank left for his Christian name will not hurt. Engleton v. Gutteridge. 11 M. & W. 465. So filling in a blank with the date does not vitiate. Keane v. Smallbone, 17 C. B. 179.

Then to what time does the issue relate here? The plaintiffs in this case undertook to prove everything that would support the assumpsit in law, otherwise the assumpsit did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused: but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument: and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar, that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my lord on the case in Molloy: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this Court: it only appears that there was a point made at Nisi Prius, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted; for if, after an alteration of this kind, it be competent to the Court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of the opinion that the plaintiffs cannot recover on

the second count. Neither do I think that they can recover on the general count, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

Per curiam.

Judgment for the defendant.

MASTER V. MILLER, IN THE EXCHEQUER CHAMBER, IN ERROR.

On behalf of the plaintiff, Wood argued as follows: It has been contended, on the other side, in the court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the knowledge of the holder; but no case has been cited to show, that an alteration, such as was made in the present instance, would vitlate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom if ever pass through a variety of hands, and are not liable to the same accordents to which bills are, from their negotiability, exposed. There is therefore good reason in the rule, which requires that deeds should be strictly kept, and which will not suffer the least alteration in them; but the same rule is not applicable to bills. In ancient times the Court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place: but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed, also, is different from that on a bill; in the one it is, that it is not then, i.e., at the time of plea pleaded, the deed of the party; 11 Co. 27, a, Pigot's Case; but the issue on a bill is, that the defendant did not undertake and promise. Here the jury have expressly found that the defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In Price v. Shute, "a bill was drawn payable the 1st of January; the person upon whom it was drawn accepts the bill to be paid the 1st of March; the servant brings back the bill; the master, perceiving the enlarged acceptance, strikes out the 1st of March, and puts in the 1st of January, and then sends the bill to be paid; the acceptor then refuses: whereupon the person to whom the monies were to be paid strikes out the 1st of January, and puts in the 1st of March again. In

an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled they did not." 2 Molloy, 109. In Nichols v. Haywood, Dyer, 59, it was holden in the case of a bond, that where the seal was destroyed by accident before the trial, the jury might find the special matter, and being after plea pleaded, it could not be assigned for error, but the plaintiff recovered. To the same point also is Cro. Eliz. 120, Michael v. Scockwith. So in the present case, it was competent to the jury to find the special matter, and an alteration in the bill, subsequent to the time of the acceptance, ought not to prevent the plaintiff from recovering. In Dr. Leyfield's Case, 10 Co. 92, b, it is said, "in great and notorious extremities, as by casualties of fire, that all his evidences were burnt in his house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses:" the casualty by fire is only put as an instance, for the principle is applicable to all cases of accident. Thus also in Read v. Brookman, 3 Term Rep. B. R. 151, a deed was pleaded as being lost by time and accident, without a profert: and the present case is within the reason and spirit of that determination.

Bearcroft, contrà.—On principles of law and sound policy, the plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill inasmuch as the time of payment was accelerated. As to the case of Price v. Shute, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

Lord Chief Justice Eyre.—I cannot bring myself to entertain any doubt on this case; and if the rest of the court are of the same opinion it is needless to put the parties to the delay and expense of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the infer-

ence is directly the reverse of that which was drawn by the counsel for the plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cipher in a bill for 100/,, by which the sum might be changed to 1000/,, and the holder having failed in attempting to recover the 1000/, might afterwards take his chance of recovering the 100%, as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they found he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of nonassumpsit is, not that he did not accept the bill, but that there was no duty binding on him at the time of plea pleaded (a). There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to show, that the duty which arises prima facie from the acceptance of a bill, was discharged in the present case by the bill itself being vitiated by the alteration which was made.

Lord Chief Baron Macdonald.—I see no distinction as to the point in question between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds.

The other Judges declared themselves of the same opinion.

Judgment affirmed.

SINCE the decision of this case it never has been doubted that [at common law] a material alteration in a bill or note not satisfactorily accounted for operates as a satisfaction thereof, except as against parties consenting to such alteration; [even though made by a stranger. See Davidson v. Cooper, 11 M. & W. 795, 13 M. & W. 343; Pattenson v. Luckley, L. R. 10 Ex. 330, 44 L. J. Ex. 180. The question of materiality has been held to be one of law and not to be judged of by surrounding circumstances. Vance v. Lowther, 1 Ex. D. 176, 45 L. J. Ex. 200. In the case of bills of exchange and promissory notes it was by the Bill of Exchange, 1882, sect. 64, enacted as follows:—

64. (1) "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party

⁽a) See Douge, 111 and 112, 8vo. Sullivan v. Montague, and the notes there.

who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent" (Leeds Bank v. Walker, 11 Q. B. D. 84, 52 L. J. Q. B. 590), "and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

In Leeds Bank v. Walker, 11 Q. B. D. 84, 52 L. J. Q. B. 590, it was held by Denman, J., that this act is not retrospective, and that a Bank of England note does not come within the section cited above.

In Alderson v. Langdale, 3 B. & Ad. 660, the doctrine [of Master v. Miller] was carried still further, and it was held that such an alteration made by the plaintiff operated as a satisfaction not only of the bill, but of the debt which it was given to secure. In Alderson v. Langdale, the debtor was the drawer of the bill altered; but in Atkinson v. Hawdon, 2 A. & E. 628, it was held that where the debtor, being himself the maker or acceptor, could have had no remedy on the instrument against any other party to it, his liability to pay the debt secured thereby would not be extinguished by the alteration. In that case the declaration, so far as is material to the point, was for goods sold and delivered, and on an account stated. Plea, that the defendant accepted a bill at two months for the debt; Replication, that it was not paid when due; Rejoinder, that the plaintiff had altered it without the defendant's assent. Demurrer, and judgment for the plaintiff, the defendant's counsel admitting that the rejoinder could not be supported. It is obvious that this case has no bearing upon the effect of such an alteration in an action on the bill itself.

Alterations in the date, sum, or time for payment, or the insertion of words authorising transfer or expressing the value to be received on some particular account, adding the name of a maker or drawer, or an unwarranted place for payment [had been before the passing of the Bills of Exchange Act, 1882, held to be], material alterations within the above rule. See Walton v. Hastings, 4 Camp. 223, 1 Stark. 215; Outhwaite v. Luntly, 4 Camp. 179; Bowman v. Nicholl, 5 T. R. 537; Cardwell v. Martin, 9 East, 190; Kershaw v. Cox, 3 Esp. 246; Knill v. Williams, 10 East, 431; Clark v. Blackstock, Holt, N. P., 474; Tidmarsh v. Grover, 1 M. & S. 735; Cowie v. Halsall, 4 B. & Ad. 197; R. v. Treble, 2 Taunt. 328; Alderson v. Langdale, 3 B. & Ad. 660; Taylor v. Moseley, 6 C. & P. 278; Crotty v. Hodges, 4 M. & Gr. 561, 5 Scott, N. R. 221, S. C.; Harrison v. Cotgreave, 4 C. B. 562, where the defendant pleaded his infancy at the time of the alteration (not stating it to have been made without his consent), and that he had not ratified the contract as altered after he came of full age; Mason v. Bradley, 11 M. & W. 590, where the name of one of the makers of a promissory note was cut off; [Warrington v. Early, 2 E. & B. 763, where the addition was of the words "interest at six per cent. per annum," in the corner of a note for the payment of a sum "with lawful interest;"] Burchfield v. Moore, 3 E. & B. 683, where a place of payment was added to the acceptance, and the acceptor was held not to be liable even to a bona fide holder for value [(see this explained below) Hirschfeld v. Smith, L. R 1 C P 310; 35 L J. C P 177 where an addition was made of the rate of exchange at which a bill drawn on Paris was to be paid and Hir Anna x Bucht 1. R 8 Ex 171, 42 L J I x 113 where the date of a bill journal four months after date was altered from the 1st to the 11th of October and the alteration was held material notwithstanding observations to the centrary which are attributed to Parke, B., in Form x Nicolas 13 M & W 7.5 Fance x, Limitor, 14 x, D 176, 45 L J Ex 200, where the alteration of the date of a cheque was held material, and 80% if x Embert 1 mater 9 Q B D, 555, where the alteration of the number on a Bank of England note was held material by the C. A., overruling the decision of Lord Coleridge, C. J.

In this case the Court disapproving of **inferfly Farter, Ir K. 3.19, 519, 17 W. R. 955, overruled the contention that the alteration to be material within the rule must be an alteration of some part of the contract contained in the altered instrument, and held that the rule would apply even to an instrument not containing a contract at all.]

When an acceptance is altered by inserting a place of payment, without adding the words, "there only," or "not elsewhere," the alteration is, in an action against the acceptor, immaterial if made by his consent | the Bills of Exchange Act, 1882, s. 19, sub-s. 2 (c) having rendered the above words necessary in order to a special acceptance. Walter v. Cubley, 2 C. & M. 151, [decided upon st. 1 & 2 G. 4, repealed, but re-enacted by the above Act]. But if made without his sanction, it avoids the bill, being the unauthorised appointment of an agent to pay the bill. Taylor v. Moseley, 6 C & P 278; Morentash v II r Jan, R & M 362; D Strow v Withorts, I M & Rob. 438; Calvert v. Rober, 4 M. & W. 417; Crafty v. Hadges, 4 M. & G. 561; 5 Scott, N. R. 221, S. C. Burchfield v. Moore, 3 E. & B. 683. C Such words, although they do not after the direct liability of the acceptor, do vary the contract between others who are parties to the bill; therefore if interpolated without his consent, they may prejudice the acceptor; they amount to a material alteration of the bill," per Campbell, C. J., in the last case. And see now the Bills of Exchange Act, 1882, 8-64, sect. 2, anti-

In Hanbury v. Lowett, 16 W. R. 795, 18 L. T. N. S. 366, the defendant had given his acceptance in blank to the plaintiff, which the latter filled up " payable at 145. Euston Road;" it was held that this was equivalent to a material alteration, and discharged the acceptor, at any rate as against the plaintiff.

An alteration made to carry out the original intention of the parties does not vitiate the instrument. Cariss v. Fattersall, 2 M. & G. 890; London and Provincial Bank v. Roberts, 22 W. R. 492.

If the alteration be material, it makes no difference that it would operate, if at all, to the benefit of the maker. Gardner v. Walsh [5 E. & B. 83], 24 L. J. 285, overruling Catton v. Simpson, 8 A. & E. 136.

Even if the alteration be made with the consent of all the parties to the bill or note; still, as it thereby becomes a new contract, the old stamp will not suffice, Bowman v. Nicholl, 5 T. R. 537; [Bathe v. Taylor, 15 East, 412;] unless, indeed, the alteration was merely to correct a mistake, and so render the instrument what it was originally intended to have been. Kershaw v. Cox, 3 Esp. 246; Jacob v. Hart, 6 M. & S. 142; Clark v. Blackstock, Holt, N. P. 474; Byron v. Thomson, 11 A. & E. 31; Cariss v. Tattersall, 3 Scott, N. R. 257, 2 M. & G. 890, S. C., which see as to the evidence sufficient to prove an assent to the alteration; Wright v. Inshaw, 1 Dowl. N. S. 802; [the intent of the alteration is a question for the jury; Byles on Bills, 14th Ed. 339.]

The addition of a new contractor with the assent of all parties does not hurt, according to Zouch v. Clay, 1 Vent. 185, 2 Lev. 35, S. C.; [or where he was originally intended to be added, Dodge v. Pringle, 29 L. J. Exch. 115;] and according to Catton v. Simpson, 8 A. & E. 136, 3 N. & P. 241, S. C., the addition of a contracting party without consent is merely inoperative, but according to the later authority of Gardner v. Walsh, supra, it vitiates the instrument.

The addition [however] of a thing perfectly immaterial does not affect the liability of the parties, Catton v. Simpson, 8 A. & E. 136. [Where the alteration is an immaterial one, the Court of Queen's Bench declining to be bound by the second resolution in Pigot's Case, 11 Rep. at fol. 27a, have decided that though made by a party to the instrument it does not vitiate the instrument. Aldous v. Cornwell, L. R. 3 Q. B. 573, 37 L. J. Q. B. 201. That was an action by the payee against the maker of a promissory note, and the alteration proved was the addition of the words "on demand," which was held to be immaterial.

See also Garrard v. Lewis, 10 Q. B. D. 30, decided before the Bills of Exchange Act, 1882, where it was held that no alteration (even it be fraudulent and unauthorised) of the marginal figure in a bill vitiates it as a bill for the full amount inserted in the body when the bill reaches the hand of a holder who is unaware that the marginal index has been improperly altered. In Caldwell v. Parker, 3 Ir. Rep. Eq. 519, 526, 17 W. R. 955, a deed had been executed between one Parker of the one part, and was executed by all four. Subsequently J. Caldwell drew his pen through his own and M. Caldwell's signatures, the seals remaining untouched. It was admitted that the erasure was made wilfully, and under the impression that it might influence claims to be made dehors the deed, but no fraud was intended, and the deed contained no grant or covenant by the Caldwells, and imposed no liability upon them. They were simply covenantees. It was held that the erasure was immaterial, and did not avoid the deed. But this case was disapproved by the C. A. Suffell v. Bank of England, 9 Q. B. D. 555, 51 L. J. Q. B. 401.

In Sellin v. Price, L. R. 2 Ex. 189, 36 L. J. Ex. 93, a composition deed had been registered under the Bankruptcy Act, 1861, s. 192, between a debtor, a surety, and "the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors." At the time of the registration there was no schedule of creditors annexed, and it was held that the subsequent addition of a schedule was a material alteration which vitiated the deed.

But in Wood v. Slack, L. R. 3 Q. B. 379, 37 L. J. Q. B. 130, where the deed was made between the debtor of the first part, and "the several other persons named in the schedule thereto as creditors, and all other the creditors, if any, of the defendant of the second part," and was executed before registration by a sufficient majority of creditors to make it binding under the Act, it was decided that the addition to the schedule subsequently to the registration of the names of two creditors was not a material alteration of the deed so as to vitiate it, the deed when registered being "as much binding upon the two creditors before as it was after their names were inserted in the schedule." See also Harris v. Tenpany, Cab. & El. 65.

In Ex parte Yates, 2 De G. & J. 191, 27 L. J. Bank. 9, the executor of the payee of a promissory note forbore, at the request of one of the makers, to press for payment of it on his procuring additional security, and accordingly another party placed his name on the note, not under the signatures of the

makers, but in the opposite corner. The Lords Justices held the addition to be not an alteration but an indorsement.

An alteration made with the consent of parties before a ball or note has issued is of no importance, for, up to the time of issue, it is in here; Process v. Richardson, Bayley on Bills, 5th ed. 116; Johnson v. D. of Martherough, 2 Stark, 313; so when made by an agent of all parties. Stomen v. Cox. 5 Tyrw 175, 1 C. M. & R. 471, S. C. And a bill or note is said to be issued when it is in the hands of some party entitled to make a claim upon it. Downes v. Richardson, ubi supra; Cardwell v. Martin, 9 East, 190; Kennersley v. Nash, 1 Stark, 352.

If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it. *Hennam v. Dickenson*, 5 Bing. 183; *Bishop v. Chamber*, 1 M. & W. 116; *Knight v. Clements*, 8 A. & E. 213; *Chiphard v. Lady Parker*, 2 M. & G. 909, 3 Scott, N. R. 233, S. C. {See the observations as to this in Byles on Bills, 14th Ed. 341.} Whether an interlineation like an alteration raises a *prima* fixib* case of suspicion, so that the onus of explaining it is thrown upon the party producing the instrument, see 2 Wms. Saund, 200 c. n. *h. It has been laid down by the Court of Queen's Bench that although in the case of a bill of exchange there is a distinct rule that an alteration must be explained, yet that in the case of a deed the presumption is that the alteration was made before execution. *Doe d. Tatum v. Catomore*, 16 Q. B. 745.

Contra of a will, because that may be altered by the testator, without wrong, after it is executed. Doe d. Shalcross v. Palmer, 16 Q. B. 747. [Accord. Christmas v. Whingates, 3 Sw. & Tr. 81; 32 L. J. Prob. 73, where the same principle was applied to the case of the mutilation of a will.] Quare whether the distinction between an alteration and an interlineation was much considered in Doe d. Tatum v. Catomore.

A cancellation by mistake does not affect the liability of the parties whose signatures are cancelled. Raper v. Birkbeck, 15 East, 17; Wilkinson v. Johnson, 2 B. & C. 428; Novelli v. Rossi, 2 B. & Ad. 765; Accord. Warwick v. Repers, 5 M. & G. 352, 6 Scott, N. R. I. S. C., where an unsuccessful attempt was made to fix a banker who had made such a cancellation, with the amount of the bill. [See as to mistake annulling the cancellation of a deed, Perrott v. Perrott, 14 East, 423. "If the absence of intention to cancel be clearly shown, the thing is not cancelled." Bumberger v. The Commercial, &c. Co., 15 C. B. 693, per Maule, J.]

Although for a long time *Pigot's Case*, 11 Rep. 26 a, and *Master v. Miller*, were the authorities always referred to upon questions of alteration, and although such questions seldom arose except in actions upon deeds, bills of exchange, and promissory notes, yet the doctrine of those two cases has been extended to other written instruments.

In Powell v. Dirett, 15 East, 29, the Court of Queen's Bench applied it to the case of bought and sold notes, and held that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his the vendor's benefit, thereby lost all right against the vendee. The same law was acted upon in Mollett v. Wackerbarth, 5 C. B. 181.

And in *Davidson* v. *Cooper*, 11 M. & W. 795, where to a count in *assumpsit* on a guaranty, the defendant pleaded that after it was given to the plaintiff, it was altered in a material particular by some person to the defendant unknown, without his consent, by affixing a seal so as to make it appear to be the deed

of the defendant, and upon a motion of judgment non abstante veredicto, the Court of Exchequer reviewed and expounded the law upon the general subject of alteration, and holding the case to fall within the doctrine of Piyot's Case, gave judgment for the defendant. And that judgment was affirmed by the Court of Exchequer Chamber, "after much doubt," 13 M. & W. 343. The doubt at first entertained by the Court of Exchequer Chamber may however be considered as fortifying their ultimate decision, which was founded on the principle, "that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state." "It is," said Lord Denman, in delivering the judgment, "highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

[Davidson v. Cooper, was acted upon in Croockewit v. Fletcher, 1 H. & N. 893, in which case the instrument vitiated by alteration was a charter-party (see also Fazakerly v. McKnight, 6 E. & B. 795), and in Pattinson v. Luckley, L. R. 10 Exch. 330; 44 L. J. Ex. 180, in which case it was a building contract.]

An instrument which, by reason of an alteration, becomes invalid as the foundation of an action, is not however thereby necessarily avoided for all purposes. For instance, the alteration of a deed of conveyance, though it may deprive the covenantee of all right to sue upon the covenants therein contained, does not affect the ownership of the property conveyed; and the deed may, it seems, still be adduced in evidence, to show what was originally conveyed thereby. West v. Steward, 14 M. & W. 47.

In such cases, to use the words of Lord Abinger, in delivering the judgment of the Court, in *Davidson* v. *Cooper*, 11 M. & W. 800, "the deed is produced merely as a proof of some right or title created by or resulting from its *having been executed*." [See *Green* v. *Attenborough*, Cam. Scac. 3 H. & C. 468; where this distinction was adopted, and also *per* Lord Esher, M. R., in *Suffell* v. *Bank of England*, 9 Q. B. D. at p. 568.]

Also, in the Earl of Falmouth v. Roberts, 9 M. & W. 469, the rule as to the destructive effect of altering a written instrument was stated by Parke, B., to apply where the obligation sought to be enforced is by reason of the instrument. That was an action by landlord against tenant for mismanagement of a farm, and an instrument purporting to be a written agreement for the letting of the farm with stipulations as to the mode of tillage, though exhibiting an erasure and interlineation of the term of years not satisfactorily accounted for, was admitted as evidence of the terms upon which the defendant (who had become tenant from year to year under a contract, implied from the fact of occupation, to abide by all the terms of the written agreement applicable to a tenancy from year to year) held the premises. In that case the instrument given in evidence does not appear to have operated specifically as an agreement upon the terms of the existing tenancy; it did not contain the contract which the plaintiff sought to enforce; it was only part of the evidence to prove that such a contract existed, though not in writing; as such evidence, only that part of the written instrument which stated the mode of tillage was material, and that part had not been altered. It was like the printed paper in Lord Bolton v. Tomlin, 5 A. & E. 856, 1 N. & P. 247, S. C., with the additional circumstance that it was identified by the tenant's signature.

In Gould v. Coombs, 1 C. B., 543, also, a promissory note, assumed to have been avoided as a contract by adding the name of a maker, was yet admitted

In Pratioson v. Lackley, L. R. 10 Ex. 330, 44 L. J. Ex. 480, the plaintiff had done work for the defendant after the execution of a written building contract. That instrument was after execution altered in a material part by the defendant's architect. By the contract no work was to be paid for until after the architect had given a certificate. But the plaintiff whilst admitting that a certificate had not been given for the work in respect of which he sued, contended that the alteration of the instrument annulled the contract and that he might sue upon a quantum meruit. The court, however, entered the judgment for the defendant, holding that though the defendant might have been disentitled to sue upon the contract as such, the instrument must still be looked at in that action to see what were the terms of the contract. See also Store it v. Aston. 8 Irish C. L. Rep. 35, 1 cm. 8 ac.: Rep. 34 of 12, 17 W. R. 255.

The cancellation of a deed of lease with the mutual consent of the lessor and lessee, does not defeat the right of the former to recover the rent in an action of debt on the demise, Lord Ward v. Lumley, 5 H. & N. 87, and in such action the cancelled instrument is admissible in evidence for the plaintiff on the issue joined on a plea of non-demisit. Some v. Some, 1b, 656; 22 L. J. Exch. 322.1

In pleading an alteration the defendant was bound before the passing of the Judicature Acts to show that it was in writing. Harden v. Crifton, 1 Q. B. 522; that it was made after his contract was complete as, for instance, in the case of the acceptor of a bill, by acceptance), Langton v. Lazarua, 5 M. & W. 629; and, either that it was made without his consent, or that it was of such a character as to render a new stamp necessary, and made under circumstances in which a new stamp could not legally be affixed; see Breakey v. Bereksley, 14 M. & W. 873, 3 Dowl. & L. 476, S. C. and also, perhaps, that the alteration was made when the instrument was in the plaintiff's custody, though made by a stranger, Davidson v. Cooper, 13 M. & W. 343; Pattinson v. Luckley, L. R. 10 Ex. 330, 44 L. J. Ex. 180. As to when a defence under the Stamp Acts was available by plea, see Lazarus v. Coorie, 3 Q. B. 459; More v. Rony, 23 W. R. 89; and also the last named case as to the cancellation of stamps on foreign bills of exchange.]

1. General rule. — The rule of law in the United States is, that the material alteration of a written contract, made by a party claiming under it, or by his privity, avoids it as to him, as against parties not consenting thereto. The courts of the

several states have differed widely in the application of this universally accepted principle to individual cases, and in this note an endeavor will be made to classify the conflicting authorities, with special reference to the more recent decisions.

- 2. Intent. If an alteration be immaterial, the tendency of the later decisions seems to be that the instrument is not avoided thereby, although there be fraudulent intent; Moye v. Herndon, 30 Miss. 110; Robinson v. Phænix Bank, 25 Ia. 430; Fuller v. Green, 64 Wis. 159 (1885). Many decisions and dicta, however, are to the effect that a fraudulent immaterial alteration vitiates a written contract; Adams v. Frye, 3 Met. 103; Ames v. Colburn, 11 Gray 390; Bliss v. McIntyr, 18 Verm. 466; Keen v. Monroe, 75 Va. 424 (1881); Milbery v. Storer, 75 Me. 69 (1883). In Commonwealth v. Emigrant Industrial Bank, 98 Mass. 12, while admitting this general doctrine, the court declined to apply it to negotiable bonds, in the hands of a bona fide purchaser for value, which had been previously fraudulently altered in an immaterial part. On the other hand, the decisions are almost unanimously agreed that a material alteration, though innocently made, avoids the instrument, the only question being whether as a matter of law the alteration be material; Taylor v. Taylor, 12 Lea (Tenn.) 714 (1883). See, also, language of Sharswood, C. J., in Craighead v. McLoney, 99 Pa. St. 211 (1881). But see infra as to restoration of altered notes.
- 3. Immaterial alterations made by party claiming under instrument. — The old doctrine laid down in Pigot's case (11 Rep. 26) that an immaterial alteration avoids an instrument, if made by a party claiming under it, has never received much favor in this country; Hatch v. Hatch, 9 Mass. 307; Chessman v. Whittemore, 23 Pick. 231; Nicholls v. Johnson, 10 Conn. 192; Hale v. Russ, 1 Me. 334; Dunn v. Clements, 7 Jones (N. C.) L. 58; Burnham v. Ayer, 35 N. H. 351; Robertson v. Hay, 91 Pa. St. 242 (1879). But in some of the earlier cases the rigorous rule of Pigot's case was approved as to immaterial alterations in deeds; Morris's Lessee v. Vanderen, 1 Dall. 64; Smith v. Weld, 2 Penn. 54; Malin v. Malin, 1 Wend. 625; Van Brunt v. Van Brunt, 3 Edw. Ch. 14. See, also, dieta in Hunt v. Adams, 6 Mass. 519. Recently in England the old rule has been severely denounced, and the court refused to apply it to negotiable paper; Aldous v. Cornwell, L. R. 3 Q. B. 573 (1868).

4. Spoliation. Another doctrine announced in Pigot's case, that a material alteration, made by a stranger, avoids the instrument, has never been introduced into the jurisprudence of this country; Rees v. Overbaugh, 6 Cow. 746; Piersol v. Grimes, 30 Ind. 129; Lubbering v. Kohlbrecher, 22 Mo. 596; Gorden v. Robertson, 48 Wis. 493 (1879); Drum v. Drum, 133 Mass. 566 (1882); Moore v. Ivers, 83 Mo. 29 (1883); Condict v. Flower, 106 III. 105 (1883); Pry r. Pry, 109 III. 466 (1884); Church v. Fowle, 142 Mass. 12 (1886). And even in England, if the spoliation takes place while the instrument is out of the custody of the plaintiff, it seems that his rights are not impaired thereby; 2 Taylor's Evidence, § 1820 (8th edition); Dayidson r. Cooper, 11 M. & W. 778. The burden of proof is upon the holder to show that the alteration was made by a stranger; Waring v. Smyth, 2 Barb, Ch. 119; Lee v. Alexander, 9 B. Mon. 25; Eckert v. Louis, 84 Ind. 99 (1882). The instrument must be declared upon in its original shape; Union National Bank v. Roberts, 45 Wis. 373 (1878).

Most of the recent decisions on this branch of the subject have been with reference to the question who is to be deemed a stranger, and there is some conflict among the authorities. In Brooks v. Allen, 62 Ind. 401 (1878), the court say that unless an agent is authorized by his principal to make an alteration, the instrument altered by him is not avoided. In Nickerson v. Sweet, 135 Mass, 514 (1883), it was decided that an unauthorized alteration, made by a general agent, without fraudulent intent, and of such a nature that no injury could result therefrom, might be reformed in equity. See, also, Van Brunt v. Eoff, 35 Barb. 501. In Hunt v. Grav, 35 N. J. Law 227 (1871), it was held that an alteration made by an agent intrusted with a note for the purpose of getting it discounted, was a mere spoliation. In Bigelow v. Stilphen, 35 Verm. 521, an agent authorized to sell the plaintiff's goods and take therefor notes payable to the plaintiff, altered a note so received without authority, and it was adjudged to be the act of a stranger. To like effect was Laugenberger v. Kroeger, 48 Cal. 147 (1874).

But in Eckert v. Louis, 84 Ind. 99 (1882), it was held that a material alteration, made by an agent of the payee before delivery to him, avoided the note. And to like effect was Lunt v. Silver, 5 Mo. App. 186 (1878). Here the agent added his own name as maker before delivery to the payee, and the note

was held to be avoided. See, also, the language of the court in Marcy v. Dunlap, 5 Lans. 365 (1871), and in Drum v. Drum, 133 Mass. 566 (1882). In Church v. Fowle, 142 Mass. 82 (1886), it was held where, at the request of both parties, a third person drew up a note, and without the knowledge of either appended his signature as a witness, the note was not avoided. As to the effect of alterations of bonds by officials while in their custody, see Harris v. Bradford, 4 Ala. 214; United States v. Hatch, 1 Paine (C. C.) 336.

In several cases it has been held, where a material alteration was made in a note by a principal, after signing by a surety, before delivery to the payee, and without his knowledge, that this did not avoid the note, since the alteration was not made by a party claiming under it, and since the note had not then become operative; Fullerton v. Sturges, 4 Ohio St. 529; Bingham v. Reddy, 5 Ben. 266 (1871). See, also, Worrall v. Gheen, 39 Penn. St. 388; Ogle v. Graham, 2 Penn. 132. But according to the great weight of authority the note is thereby avoided; Goodman v. Eastman, 4 N. H. 455; Wood v. Steele, 6 Wall. 80; Draper v. Wood, 112 Mass. 315; Hert v. Oehler, 80 Ind. 83 (1881); Jones v. Bangs, 40 Ohio St. 139 (1883). See, however, Whitmore v. Nickerson, 125 Mass. 496 (1878). In a recent Minnesota case it was held that a note was not avoided by the principal's securing another surety without the consent of the first surety, the payee being ignorant of the facts in the case; Ward v. Hackett, 30 Minn. 150 (1883). See, also, Snyder v. Van Doren, 46 Wis. 602 (1879). In Wilmington & Weldon R. R. Co. v. Kitchin, 91 N. C. 39 (1884) it was even held, where the name of one surety on a bond was erased by the principal, that a second surety was not discharged, if the obligee was ignorant of the erasure.

5. Alteration of parol contracts by consent of parties. — All contracts not under seal may be altered or changed in their terms by oral agreement, and alterations so made, if founded upon a valuable consideration, are the foundation of a new contract ingrafted upon the old; Prouty v. Williams, 123 Mass. 297 (1877); Boston v. Benson, 12 Cush. 61; Pelton v. Prescott, 13 Ia. 567 (as to a new consideration).

A note altered by consent upon a condition subsequent remains valid, though the condition never be performed; Stoddard v. Penniman, 113 Mass. 386. An instrument remains valid against parties who consent to an alteration, though avoided as to those not consenting; Waring v. Wiliams, 8 Pick. 322; Smith v. Weld, 2 Penn, 54; Wills v. Wilson, 3 Oreg. 308 (1871); Craighead v. McLoney, 99 Pa. St. 211 (1881). See, also, Myers v. Nell, 84 Penn. St. 369 (1877). If one maker voluntarily pays an altered note, he cannot recover of a nonassenting maker; Davis v. Bauer, 41 Ohio St. 257 (1884). The plaintiff is liable for costs to parties not consenting to the alteration, though he recover judgment against those who have consented; Broughton r. Fuller, 9 Verm. 373; Wills r. Wilson, 3 Oreg. 308. Consent to an alteration may be implied, both from the acts of the party and from a custom; Bowers v. Jewell, 2 N. H. 543; Clute r. Small, 17 Wend. 238; Woodworth v. Bank of America, 19 Johns. 391. In Taddikin v. Cantrell, 69 N. Y. 597 (1877), it was held that the payee of a note, given by a married woman, had no implied authority to add words which would bind her separate estate, but that such an authority might be implied, if at the time of signing the note, she expressed the desire that the note might be made legal and binding. See, also, Reeves v. Pierson, 23 Hun 185 (1880).

An unauthorized alteration may be ratified by subsequent acts of the party to be charged. Thus in Prouty v. Wilson, cited supra, it was decided, where a note was altered by a payee by the addition of the words "at eight per cent.," with the consent of the maker, in consideration of forbearance to sue, that evidence of the payment of the interest at eight per cent. by a surety, would warrant a jury in finding that he had ratified the alteration. In a very recent Illinois case, Canon v. Grigsby, 116 Ill. 151 (1886), the court held, where a joint note was given for the purchase of goods, and one of the makers, without the consent of the other, altered it in a material part, at the request of the payee, that a failure to return the goods, after knowledge of the alteration, within a reasonable time, would constitute a ratification on the part of the other maker. See, also, Grimsted v. Briggs, 4 Ia. 557; King v. Hunt, 13 Mo. 97; Humphreys v. Guillow, 13 N. H. 385; Gardiner v. Harback, 21 Ill. 129; State Bank v. Rising, 4 Hun 793. A renewal note given for one that had been altered would not constitute a ratification, unless given with knowledge of the fact; Fraker v. Cullum, 21 Kans. 555 (1879). Whether the alteration was made by consent, or was subsequently ratified, is a question of

fact for the jury, and the burden of proof is on the plaintiff; Stahl v. Berger, 10 S. & R. 170; Barrington v. Bank of Washington, 14 S. & R. 405; Overton v. Mathews, 35 Ark. 147 (1879).

6. Filling up blanks in specialties. - In Massachusetts and a few other states the law is that material blanks in an instrument under seal, cannot be filled up, after signing and sealing, by an agent acting under a parol authority, except in the presence of the grantor or obligor, without a redelivery; Burns v. Lynde, 6 Allen 305; Basford v. Pearson, 9 Allen 387; Skinner v. Brigham, 126 Mass. 132 (1879); Upton v. Archer, 41 Cal. 85; Preston v. Hull, 23 Gratt. 605 (1873); Arguello v. Bours, 67 Cal. 447 (1885); Adamson v. Hartman, 40 Ark. 58 (1882); Viser v. Rice, 33 Tex. 139 (1870). See, also, State v. Boring, 15 Ohio 507; Evarts v. Steger, 6 Oreg. 55; Davenport v. Sleight, 2 Dev. & B. 381; Bragg v. Fessenden, 11 Ill. 544; Cummins v. Cassilly, 5 B. Mon. 74; Williams v. Crutcher, 5 How. (Miss.) 71; Lockwood v. Bassett, 49 Mich. 546 (1883). A deed of conveyance is operative as to all parties who have properly executed it, though invalid as to others; Furnass v. Durgin, 119 Mass. 501 (1876.) In two very recent Massachusetts cases, the doctrine of Burns v. Lynde has been modified, where the grantee or obligee is ignorant of the defective filling up of the blanks; Phelps v. Sullivan, 140 Mass. 36 (1885); White v. Duggan, id. 18. The former case was in regard to the assignment of a mortgage. "When a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, we think the grantee is estopped to deny that the deed as delivered was his deed." Morton, C. J., in Phelps v. Sullivan. Pence v. Arbuckle, 22 Minn. 417 (1876) accord; Preston v. Hull, 23 Gratt. 605, semble, contra. White v. Duggan goes much farther, and decides that where the penal sum of a probate bond is filled in by the principal in a greater amount than the surety, who executed the bond in blank, has authorized, the surety is estopped, where the obligee is ignorant of the fact, to deny not only the validity of the execution of the bond, but also the authority of the agent. The language of the court, however, is very guarded, and except in the case of official bonds, it seems that they would hardly carry the doctrine of

estoppel in pais so far. In Phelps v. Sullivan this point is expressly left undecided. But in Owen v. Perry, 25 Ia. 412, and Field v. Stagg, 52 Mo. 534 (1873), it was decided that a grantor who executed a deed of conveyance containing material blanks, was estopped as to an innocent grantee, where the agent had deviated from his authority in filling up the blanks. See, however, Hammerslough v. Cheatham, 84 Mo. 13 (1884).

In the other states the strict technical rule is repudiated, and the law is that an agent under a parol authority may, after execution by the principal, fill up material blanks in a deed; Duncan v. Hodges, 4 McCord (S. C.) 137; Wooly v. Constant, 4 Johns. 54; Kerwin's case, 8 Cow. 118; Wily v. Moore, 17 S. & R. 438; White v. Verm. & Mass. Railroad, 21 How. 575; South Berwick v. Huntress, 53 Me. 89; Van Etta v. Evenson, 28 Wis. 33 (1871); Swarz v. Ballou, 47 Iowa 188 (1877); Garland v. Wills, 15 Neb. 298 (1883); Allen v. Withrow, 110 U. S. 119 (1884.)

Many courts, however, have been inclined to narrow the application of this doctrine as much as possible. In Allen v. Withrow, supra, Mr. Justice Field, while recognizing the general principle, says: "One condition essential to make a deed thus executed in blank operate as a conveyance of the property described in it, is that the blank be filled before, or at the time of the delivery of the deed to the grantee named." Chauncey v. Arnold, 24 N. Y. 330; Whittaker v. Miller, 83 Ill. 381 (1876), accord. In the former case, however, two of the judges thought that a mortgagee, if authorized by a previous parol authority, might fill up a material blank in a mortgage, even after delivery, and such was the decision in Vleit v. Camp, 13 Wis. 198, in reference to a warrant of attorney. See, also, Devin v. Himer, 29 Iowa 297 (1870.)

In Simms v. Hervey, 19 Iowa 273, Dillon, C. J., thought that this doctrine should be confined to bonds, but this distinction is not borne out by the authorities. In this case it was decided, however, that where none of the blanks in a printed form of a deed of conveyance are filled up before execution, the instrument does not become operative by the subsequent filling up of the blanks by an agent under a parol authority; and it is believed that it has never been decided that such a deed of conveyance would be operative. It seems, however, difficult on principle to distinguish between filling up all the blanks in

a printed form and the filling up of one material blank. In most of the cases in regard to deeds of conveyance, the blank has been for the name of the grantee; and it is held that this blank may be filled up by an agent under a parol authority with the name of any purchaser he may be able to secure. In Schintz v. McManamy, 33 Wis. 299 (1873), it was held that the deed would be invalid, when the agent was authorized to fill up the blank with the name of a specified grantee, but wrote in the name of a different grantee. But see cases cited supra as to estoppel. In some of the states it has been decided that an implied authority to fill up blanks is sufficient; South Berwick v. Huntress, supra; Drury v. Foster, 2 Wall. 24; Clark v. Allen, 34 Iowa 190. But see Chauncey v. Arnold, supra; United States v. Nelson, 2 Brock. (C. C.) 64; Smith v. Fellows, 9 Jones & Sp. (N. Y.) 36 (1876), contra.

7. Alteration of contracts under seal by consent of parties. -In Speake v. United States, 9 Cranch 28, it was decided that an official bond, altered in a material part by the obligee after delivery to him, with the oral consent of the obligor, was binding in its altered form, Livingston J., dissenting. See, also, Barrington v. Bank of Washington, 14 S. & R. 405; Camden Bank v. Hall, 2 Green (N. J.) 583. In Sans v. The People. 8 Ill. 327, it was held that a previous assent was necessary to make the bond binding in its altered form. In Drury v. Foster, 2 Wall. 24, Nelson, J., says: "Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this date is that the power is sufficient." In Howe v. Peabody, 2 Gray 556, a probate bond altered by parol authority after delivery, was adjudged binding in its new form, on the authority of Speake v. United States. In this case, however, the evidence showed a redelivery. See, also, opinion of Parsons, C. J., in Smith v. Crooker, 5 Mass. 538. And this seems to have been accepted as law in respect to alterations in bonds, in all the states where the question has arisen.

But the doctrine that contracts under seal may be altered or changed after they have become operative by delivery, by the parol authority of the obligor, without a redelivery and in his absence, has never been extended to deeds of conveyance, and the statutes of the several states in regard to the formalities necessary for the transfer of land, would probably be considered an insuperable obstacle. Thus in Collins c. Collins, 51 Miss. \$11, it was held, where a deed of trust given by way of mortgage was altered after delivery and recording, so as to cover a new loan, that the alteration was moperative without a redelivory, although the change was entered upon the record. But in Bassett v. Bassett, 55 Me. 127, an unrecorded deed of an undividud half of a piece of land, was held to convey the whole estate, when the grantor, long after the first delivery, struck out the words "one undivided half of," and redelivered the instrument. See also Prettyman v. Goodrich, 23 III, 320; Cary v. O'Hara, Rowe (Irish) 51; Keiley v. Ahearne, Batty (Irish) 18 (n). Even in the case of bonds it is hard to understand how on common law principles they can be changed or altered, without the same formalities which were necessary to their inception. "After perfecting a deed in one form, no muterial alteration should be set up, unaccompanied by a new delivery, and a note or memorandum thereof. . . . The terms in which the deed is originally executed should alone be binding until alterations are introduced into it by the same formalities." Livingston, J., in dissenting opinion, supra. The case of Hudson v. Revett, 5 Bing, 368, often cited in support of the doctrine of Speake v. United States, had reference to the filling up of material blanks in a bond after execution, and as the obligor was present when the blanks were filled up, there was evidence of a redelivery. Some of the dieta of Best, C. J., however, went much farther than the decision required, and are difficult to reconcile with the reasoning of Baron Parke, in Hibblewhite r. M'Morine, 6 M. & W. 200, which finally established in England the rule that material blanks in specialties could not be filled up by parol authority; and in this country it does not seem probable that those courts at least which have adopted the doctrine of this latter case, would be inclined to hold that specialties can be changed or altered in their terms by parol authority, without a redelivery.

8. Effect of alteration. (a) As to deeds of conveyance. — It is well settled both in England and in this country, that if a deed of conveyance is materially altered by a party claiming under it, its past operation is not affected, and titles vested by it are not disturbed: Lewis v. Payn, 8 Cow. 71; Chessman v. Whittemore, 23 Pick. 231; Herrick v. Malin, 22 Wend. 388; Wallace v. Armstead, 44 Penn. St. 492; Woods v. Hilderbrand,

46 Mo. 284; Wheeler v. Single, 62 Wis. 380 (1885). See, also, Burnett v. McCluey, 78 Mo. 676 (1883). In Williams v. Van-Tuyle, 2 Ohio St. 336, it was held, where a bond given by a trustee by way of a declaration of trust, was altered by the cestui que trust, the equitable estate was not divested thereby. The altered deed may be introduced in evidence to show the premises conveyed by it; Hatch v. Hatch, 9 Mass. 307; Burnett v. McCluey, cited supra.

In those states where a mortgage is considered an absolute conveyance of the title upon a condition subsequent no alteration will defeat a suit for foreclosure; Kendall v. Kendall, 12 Allen 92. But in those states where a mortgage is treated as a mere chose in action or incident to the note, any material alteration of the mortgage or of the mortgage note, will be a good defence to a foreclosure suit; and the assignee of the mortgagee is in no better position; Waring v. Smyth, 2 Barb. Ch. 119; Marcy v. Dunlap, 5 Lans. 365 (1872); Mersman v. Werges, 1 McCrary (C. C.) 528 (1880); Toomer v. Rutland, 57 Ala. 379; Bowman v. Mitchell, 79 Ind. 84 (1881); Tate v. Fletcher, 77 Ind. 102 (1881); Pereau v. Frederick, 17 Neb. 117 (1885); Johnson v. Moor, 33 Kan. 90 (1885); Osborne v. Andrews, S. C. Kan. Oct. 8, 1887. But it has been decided by several courts that a mortgage may be foreclosed, when the note has been altered without fraudulent intent; Vogle v. Ripper, 34 Ill. 100; Clough v. Seay, 49 Iowa 111 (1878). Bowman v. Mitchell, cited supra, contra. And in Plyler v. Elliott, 19 S. C. 257 (1882), it was held that the mortgage might be enforced, although the note had been fraudulently altered. When a lessee for a term of years materially alters his lease, it has been held that the lease is avoided, and that the lessor may enter at once; Bliss v. McIntyre, 18 Verm. 466. See also Burguin v. Bishop, 91 Pa. St. 336 (1879).

(b) Right to sue on original consideration. — When negotiable paper, which has been altered by a party claiming under it, is itself the sole ground of action, not having been given in satisfaction of a precedent debt or claim, it seems clear on principle that on a material alteration of the paper, all remedy whatsoever is lost. But it is very generally held, where there is a cause of action independent of the note, which is only temporarily merged thereby, that this is not forfeited, if the alteration in the negotiable instrument was made without fraudulent in-

tent; Clute v. Small, 17 Wend, 242; Booth v. Powers, 56 N. Y. 22 (1874); Morrison v. Welty, 18 Md. 169; Watren v. Layton, 3 Harr. 404; State Savings Bank v. Shaffer, 9 Neb. 1 (1879); Sulliyan v. Ruddisill, 63 Iowa 158 (1883); Wallace v. Wallace, 8 Ill. App. 69 (1880); Matteson v. Ellsworth, 33 Wis. 488 (1873); Meyer r. Huncke, 55 N. Y. 419 (1874). But the surrender of the altered instrument is a condition precedent to an action on the original consideration, and the note cannot itself be put in evidence in such an action. See cases cited supra. The burden of proof is upon the holder to show that the alteration was innocently made; Robinson v. Reed, 46 Iowa 219 (1877); Black v. Bowman, 15 III. App. 166 (1884). But see Vogle v. Ripper, 34 III. 100. In Morrison v. Higgins, 53 Iowa 76, it was held that an action would lie for goods sold and delivered, when a note given for the price by the buyer had been innocently altered. The only cause of action originally was upon the note, and it is hard to understand how even an innocent alteration can confer a new right; and this case is opposed to the great weight of authority. But see Vogle v. Ripper, supra. In those states where it is held that negotiable paper given on account of a precedent claim, is presumptively a satisfaction of that claim, it would seem that this presumption must be rebutted, before the original consideration can be sued upon; and it is believed that in Massachusetts and the other states where the above doctrine is law, it has never been expressly decided that the original consideration can be resorted to in any case. In fact there are some strong dieta to the contrary; Martendale v. Follet, 1 N. H. 99; Smith v. Mace, 44 N. H. 553; Bigelow v. Stilphen, 35 Verm. 525; White v. Hass, 32 Ala. 430. See, also, Wheelock v. Freeman, 13 Pick. 165.

(e) Right of holder to restore note to its original form. — In Nevins v. Le Grand, 15 Mass. 436, where a special indorsement was innocently erased in order that the indorsee might transfer the note by delivery without indorsing it, the court allowed the instrument to be restored to its original form, and held that a suit might be maintained upon the reformed instrument against the maker. "Justice requires and the law allows it to be done." Parsons, C. J. In Horst v. Wagner, 43 Iowa 373 (1876), it was held where a payee, ignorant of the proper method of transferring the instrument, substituted for his own name the name of the transferee, and subsequently before

delivery restored it to its original form and then indorsed it, that the indorsee could maintain an action upon it against the maker. These decisions may, perhaps, be sustained on the ground that the alteration was with reference to the transfer of the title, and in no wise affected the rights of the maker. But see infra as to material alterations affecting the operation of negotiable paper. In Whitmore v. Nickerson, 125 Mass. 496 (1878), where a maker made a material alteration in a note indorsed for his accommodation, but restored it to its original form before delivery to the payee, it was held that the alteration did not affect the liability of the indorser, since when the note first became operative it was in the same state as when indorsed. See, also, Nickerson v. Sweet, 135 Mass. 514 (1883), which held that a note materially altered by an unauthorized agent might be reformed in equity.

Kounz v. Kennedy, 63 Penn. St. 187, and Shepard v. Whetstone, 51 Iowa 457 (1879), go much further than the cases above cited, and hold that where the words "with interest" were added to the face of the note by a holder without fraudulent intent, an action may be maintained thereon on its restoration to its original shape. Sharswood, J., dissented from the decision in Kounz v. Kennedy, and it has been criticised in several later decisions of the same court. But see Lynch v. Hicks, S. C. Ga. Oct. 15th, 1887.

- 9. Materiality of alteration.— An alteration which changes the terms of a written contract so as to vary its legal effect and operation is material; and the instrument is none the less avoided because the effect of the alteration is beneficial to the party to be charged. The destruction of the identity of the contract in its legal effect vitiates the instrument. See Schwarz v. Oppold, 74 N. Y. 307 (1878); Osgood v. Stevenson, 143 Mass. 399 (1886), which was a case of the material alteration of a written contract for the purchase of a book.
- (a) Material alterations.—(1) Date and time.—The date and time of performance of a written contract are essential parts of it; hence any alteration in this respect avoids the instrument; Master v. Miller, principal case; Wheelock v. Freeman, 13 Pick. 165; Miller v. Gilleland, 19 Penn. St. 119; Lisle v. Rogers, 18 B. Mon. 528; Britton v. Dierker, 46 Mo. 592; Brown v. Straw, 6 Neb. 536 (1876); Taylor v. Taylor, 12 Lea (Tenn.) 714 (1883). See, also, Lemay v. Johnson, 35 Ark. 225 (1879).

And the alteration is fatal even though the time of performance be extended thereby; Davis v. Jenny, 1 Met. 221; Wood v. Steele, 6 Wall, 80; Wyman c. Yeomans, 84 Ill, 403 (1877); Rogers v. Vosburgh, 87 N. Y. 228 (1881). An alteration in the date of a check avoids it; Vance v. Lowther, 1 Ex. D. 176 (1876); Crawford v. West Side Bank, 100 N. Y. 50 (1885). So an alteration in the date of a contract for the sale of goods was held material in Getty v. Shearer, 20 Penn. St. 12. In Stephen v. Graham, 7 S. & R. 505, it was decided where the dute of a note was altered to the day before, the note was avoided, although the note would otherwise have fallen due on Sunday, so that the effect would have been the same. But see Ames v. Colburn, 11 Gray 390. It was decided that an alteration of the date of an indersement was immuterial in Griffith r. Cox, 1 Tenn. 210; but quare. See, also, on the subject of alterations in the date of a contract, Hamilton v. Wood, 70 Ind. 306 (1880), and Gill v. Hopkins, 19 III. App. 74 (1886).

- (2) Place of performance. Adding, crasing, or changing the place of payment, is a material alteration of a bill or note; and the law in this regard is not affected by the statute provisions existing in many states as to general acceptances; Nazro v, Fuller, 24 Wend, 374; Woodworth v. Bank of America, 19 John, 391; Hill v. Cooley, 46 Penn. 8t. 259; Whitesides v. Northern Bank, 10 Bush 501 (1874); Toomer v. Rutland, 57 Ala, 379 (1877); Townsend v. Star Wagon Co., 10 Neb. 615 (1880); Cronkhite v. Nebker, 81 Ind. 319 (1882); Charlton v. Reed, 61 Iowa 166 (1883). As to drawee's right to write in a place of payment on accepting the bill, without discharging the drawer, see Troy City Bank v. Lauman, 19 N. Y. 480; Niagara District Bank v. Fairman, 31 Barb, 404. It was held in Mahairoe Bank v. Douglass, 31 Conn. 170, that an alteration of the place of date was material.
- (3) Alterations in the principal or interest.—Any alteration in the principal of a written contract for the payment of money, avoids it, whether it be increased by the alteration, Goodman v. Eastman, 4 N. H. 455; Bank of Commerce v. Union Bank, 3 Coms. 230; Ætna Bank v. Winchester, 43 Conn. 391 (1875); Batchelder v. White, 80 Va. 103 (1886); Osborne v. Van Houten, 45 Mich. 444 (1881) (as to a guaranty); Johnson v. Moore, 33 Kans. 90 (1885) (as to the consideration of a mortgage); or lessened, Hewins v. Cargill, 67 Me. 554 (1877);

State Savings Bank v. Shaffer, 9 Neb. 1 (1879). In an early case in Pennsylvania it was held where the amount of a note was lessened by the principal, after execution by the surety, and before delivery to the payee, that the note was not avoided; but as the identity of the contract is now considered the test of materiality, this decision seems clearly to be wrong; Ogle v. Graham, 2 Penn. 132. In Doane v. Eldridge, 16 Gray, 254, a collector's bond was held to be avoided by an alteration of the penal sum to a smaller amount.

So any change in the rate of interest, or the addition of the words "with interest," or similar words, to a non-interest bearing note, avoids the instrument; Fay v. Smith, 1 Allen 477; Draper v. Wood, 112 Mass. 315; Waterman v. Vose, 43 Me. 504; Lee v. Stairbird, 55 Me. 491; McGrath v. Clark, 56 N. Y. 34 (1874); Schwarz v. Oppold, 74 N. Y. 307 (1878); Lamar v. Brown, 56 Ala. 157 (1876); Neff v. Horner, 63 Penn. St. 327; Craighead v. McLoney, 99 Pa. St. 211 (1881); Schnewind v. Hacket, 54 Ind. 248 (1876); Brooks v. Allen, 62 Ind. 401 (1878); Bowman v. Mitchell, 79 Ind. 84 (1881); Jones v. Bangs, 40 Ohio St. 139 (1883); Thompson v. Massie, 41 Ohio St. 307 (1884); Ivory v. Michael, 33 Mo. 400; Long v. Mason, 84 N. C. 15 (1881) (of a bond); Kennedy v. Moor, 17 S. C. 464 (1882); Canon v. Grigsby, 116 Ill. 151 (1886). In Whitmer v. Frye, 10 Mo. 348, a bond was held to be avoided by an alteration which lessened the rate of interest. So where a note bore interest "at one per cent." and "one" was erased; Moore v. Hutchinson, 69 Mo. 429 (1879). So where the words "after maturity" were added to the interest clause; Coburn v. Webb, 56 Ind. 96 (1877). See, also, Patterson v. McNeely, 16 Ohio St. 348, and Leonard v. Phillips, 39 Mich. 182. In Woodward v. Anderson, 63 Iowa 503 (1884), it was decided that the alteration of the rate of interest in a certificate of deposit avoided it.

(4) Alterations in the medium of payment. — The insertion of words fixing the medium of payment, or the erasure of such words, is a material alteration; Darwin v. Rippey, 63 N. C. 318; Laugenberger v. Kroeger, 48 Cal. 135; Bogarth v. Breedlove, 39 Tex. 561; Wills v. Wilson, 3 Oreg. 308. But it was held in Bridges v. Winters, 42 Miss. 135, that the insertion of the words "in gold" after the amount in a note, was not a material alteration, if gold was the only legal tender. See, also, Hanson v. Crawley, 41 Ga. 303. In the Supreme Court of the United

States, it was decided, where an order was made payable "in drafts to the order of H. G. A.," and these words were crased, and "in current funds" inserted in their place, that the instrument was avoided; Angle v. N. W. &c. Insurance Co., 92 U. S. 330 (1875). See also Martindale v. Follet, 1 N. H. 95; Schwalm v. McIntyre, 17 Wis. 232.

(5) Alterations in respect of parties. Any change in the parties to a contract, either as to their personality, number, or their legal relations to one another, is a material alteration. As to alterations of this description avoiding negotiable paper, see Haskell v. Champion, 30 Mo. 136; McCramer v. Thompson, 21 Iowa 244; Davis r. Bauer, 41 Ohio St. 257 (1884); Morrison v. Garth, 78 Mo. 434 (1883); Robbinson v. Berryman, 22 Mo. App. 509 (1886). As to bonds, see Smith v. Weld, 2 Penn. 54; State v. Polke, 7 Blackf. 27; Dolbin v. Norton, 17 Me. 307; Smith r. United States, 2 Wall, 219; United States r. O'Neill, 19 Fed. Rep. 56 (1884). But see Hale r. Russ, 1 Me. 334; Wilmington & Weldon R. R. Co. v. Kitchin, 91 N. C. 39 (1884). As to contracts of guaranty see Wilde v. Armsby, 6 Cush. 314. Striking out the word "surety" appended to the name of one of two joint makers has been held to be a material alteration. Laub v. Paine, 46 Iowa 550 (1877). But where the holder strikes out the name of the surety with his consent, it has been held that the principal is not discharged; Huntingdon v. Finch, 3 Ohio St. 445. Changing a joint note to a joint and several note, or a joint and several note to a joint note, avoids it; Humphreys v. Guillow, 13 N. H. 385; Draper v. Wood, 112 Mass. 315; Eckert r. Louis, 84 Ind. 99 (1882). And other written contracts are avoided in like manner; Waring v. Williams, 8 Pick. 322; Kline v. Raymond, 70 Ind. 271 (1880). But where by statute a joint note has the effect of a joint and several note, such an alteration is immaterial; Miller v. Reed, 27 Penn. St. 244. Adding or erasing the word "junior" is a material alteration; Broughton v. Fuller, 9 Verm. 373. So adding the word "collector" to a payee's name; York v. Janes, 43 N. J. L. 332 (1881). But see Manufacturers' Bank v. Follett, 11 R. I. 92 (1876), where the word "agent," appended to a maker's name, was treated as merely descriptio persona, and held not to avoid the note.

Effect of the addition of another maker. — As to the addition of a new maker or surety, the cases are conflicting. The

addition of a new surety by the principal, without the consent of the first surety, before delivery to the payee, is generally held to be a material alteration. When the instrument first becomes operative, it is different in its legal effect from that signed by the first surety; Whitmore v. Nickerson, 125 Mass. 496 (1878); Hall v. McHenry, 19 Iowa 521; Haskell v. Champion, 30 Mo. 136. In Ward v. Hackett, 30 Minn. 150 (1883), it was held, where the payee was ignorant of the addition of the second surety, that the note was not avoided thereby. See, also, Snyder v. Van Doren, 46 Wis. 602 (1879). If a new surety is procured by the payee or a subsequent holder after delivery by the maker, it is held in Massachusetts that this constitutes a collateral and independent contract, and that the note is not avoided thereby; Stone v. White, 8 Gray 589. Monson v. Drakely, 40 Conn. 552 (1873); Mersman v. Werges, 112 U.S. 139 (1884), accord. In McCaughey v. Smith, 27 N. Y. 39, and Brownell v. Winnie, 29 N. Y. 400, it was held that the addition of a new maker did not avoid the note, and that his liability was that of a joint and several promisor. Muir v. Demaree, 12 Wend. 468; Patridge v. Colby, 19 Barb. 248; Card v. Miller, 1 Hun 504; Denick v. Hubbard, 27 Hun 347 (1882); Miller v. Finley, 26 Mich. 249 (1872), accord. In the following cases, however, such an alteration was held to avoid the note; Chappell v. Spencer, 23 Barb. 534; McVean v. Scott, 46 Barb. 379 (overruled in Denick v. Hubbard, supra); Hamilton v. Hooper, 46 Iowa 515; Lunt v. Silver, 5 Mo. App. 186 (1878); Sullivan v. Ruddisill, 63 Iowa 158 (1883); Nicholson v. Combs, 90 Ind. 515 (1883). The new surety, however, will be bound; Hamilton v. Hooper, supra. As to the addition of a new surety in a bond avoiding the instrument, see Harper v. The State, 7 Blackf. 61; O'Neal v. Long, 4 Cranch 60.

(6) Alterations affecting the operation.—A parol contract is avoided by the appending of a seal; Morrison v. Welty, 18 Md. 169; United States v. Linn, 1 How. 104; Vaughan v. Fowler, 14 S. C. 355 (1880). See, also, Fullerton v. Sturges, 4 Ohio St. 529. And it would seem that a specialty must be avoided by detaching a seal, and it was so decided in Piercy v. Piercy, 5 W. Va. 199. See, also, Cutts v. United States, 1 Gall. (C. C.) 69; United States v. Spaulding, 2 Mas. (C. C.) 478. Where a seal is appended to the signature of one of several joint promisors, the instrument is avoided as to all; Biery v. Haines, 5

Whart, 563. As to the effect of erasing a \approx roll, see Keen v. Monroe, 75 Va. 424 (1881).

The addition of witnesses As to the effect of adding to written contracts the names of parties purporting to be witnesses, thereto, it is held, where it attested they are effected by no statute of limitations, that the alteration is immutorial, and does not avoid the instrument unless made with traudulent intent; Adams v. Frye, 3 Mer. 103 (as to bonds); Blackwell v. Lane, J. Dev. & B. (N. C.) L. 113. But in Pullov e. Green, 64 Wis. 159 (1885), as to notes (there being no statute of limitations in regard to attested notes), it was decided that a note was not avoided by such an alteration, though made with fraudulent intent. But see Marchaller, Gourder, 10 S. & R. 164. Where there is a statute of limitations concerning attested notes, such an alteration avoids the instrument; Homer v. Wallis, 11 Mass, 309; Eddy v. Bond, 19 Mg, 461; and it would seem that the question of intent would be irrelevant; but it has been decided, that if the attesting witness was actually present when the note was executed, that such an alteration does not avoid it; Rollins v. Bartlett, 20 Me. 510; Thornton v. Appleton, 29 Me. 298; Milburry v. Storer, 75 Me. 69 (1883). See, also, Smith v. Dunham, 8 Pick. 256. In Ford v. Ford, 17 Pick. 418, it was held that the addition of a second witness to an attested note did not avoid it. See, also, Willard v. Clark, 7 Met. 435; Church v. Fowle, 142 Mass. 82 (1886). In Sharpe. v. Bagwell, 1 Dev. Eq. 115, where a payee cut off the name of an attesting witness, it was held that the note was avoided.

It has been held, where words are added to the general consideration clause in a note, describing the special consideration, that the note is avoided; Knill r. Williams, 10 East 413; Low v. Argrave, 30 Ga. 129. Adding words of negotiability to a non-negotiable note avoids it; Brute v. Westcott, 3 Barb. 274; Johnson v. Bank of United States, 2 B. Mon. 310; State v. Stratton, 27 Iowa 424. See, also, Hollis v. Vandergrift, 5 Del. 521; McCoy v. Lockwood, 71 Ind. 319 (1880). In Byrom v. Thompson, 11 Ad. & El. 31, it was held that such words might be inserted where they had been omitted by a mutual mistake. The substitution of the words "or bearer" for the words "or order" in a note is a material alteration; Belknap v. National Bank of America, 100 Mass. 376; Union National Bank v. Roberts, 45 Wis. 373; Booth v. Powers, 56 N. Y. 22 (1874);

Needles v. Shaffer, 60 Iowa 65 (1882). But in Weaver v. Bromley (Mich.) 31 N. W. Rep. 839 (1887), it was adjudged that writing in the words "or bearer" without the erasure of the words "or order" did not avoid the note. In Flint v. Craig, 59 Barb. 330, it was decided that it was not a material alteration to change a note payable to bearer to one payable to order. In Stoddard v. Penniman, 108 Mass. 366, where a note payable to the maker's order, and indorsed in blank for his accommodation, was altered by the maker so as to be payable to the plaintiff who advanced money upon it, the court decided that the indorser was discharged, since his liability was thereby changed from that of an indorser to that of an original promisor. See, also, Davis v. Bauer, 41 Ohio St. 257 (1884). In Grimes v. Piersol, 25 Ind. 246, where an indorsee, without the consent of the indorser, substituted for his own name in the full indorsement the name of a transferee, it was held that the indorser was not liable to such transferee. But see supra as to the restoration of altered instruments. See, also, Mechanics' Bank v. Valley Packing Co., 70 Mo. 643 (1879). Filling up a blank indorsement contrary to the tenor of the bill is a material alteration; Hirshfeld v. Smith, L. R. 1 C. P. 340. So adding a waiver of demand and notice to an indorsement; Farmer v. Rand, 14 Me. 225. But quære whether the note would be avoided as to the maker. So even adding the words "without recourse" to an indorsement discharges the indorser; Luth v. Stewart, 6 Victorian Rep. 383. The insertion or obliteration of a material memorandum, whether written in the body of the instrument, or in the margin, or indorsed upon it, is a material alteration; Warrington v. Early, 2 El. & B. 763; Gerrish v. Glines, 56 N. H. 9 (1877); Johnson v. Heagan, 23 Me. 329; Woodworth v. Bank of America, 19 John. 381; Benedict v. Cowden, 49 N. Y. 396; Wheelock v. Freeman. 13 Pick. 165; Wait v. Pomeroy, 20 Mich. 425; Blake v. Coleman, 22 Wis. 415; Price v. Tallman, 1 N. J. Law 447. See, also, Johnston v. May, 76 Ind. 293 (1881). As to immaterial memoranda, see infra. In Dietz v. Harder, 72 Ind. 208 (1880), it was held that the material alteration of an instrument in suit avoided it. See, also, Rhoades v. Castner, 12 Allen 130.

(b) Immaterial alterations. — The addition, or striking out, of words in a written contract does not avoid it, if the legal effect remains unchanged. Thus writing in the name of the bank

after the word "cashier," appended to signature on a note; Bank of Genesee v. Patchin Bank, 3 Kern, 309. See, also, Manufacturers' Bank v. Follett, 11 R. I. 92. So cutting off the word "trustees" appended to the signatures of the makers of a note, since their liability was not affected thereby; Burlingame v. Brewster, 79 III, 515; Haves v. Matthews, 63 Ind. 412. So substituting the firm style for the words "Providence Steam Co.," when the parties did business under both names; Arnold r. Jones, 2 R. I. 345. So adding the Christian name of the drawer of a bill; Blair r. Bank of Tennessee, 11 Humph, 84. So the interlineation of the surname of the payee; Manchet v. Cason, 1 Brev. 307. So changing the Christian name of payee so as to conform to the fact; Desby r. Thrall, 11 Verm. 114. So crossing out the middle letter of payce's name which had been accidentally inserted; Cole v. Hills, 44 N. H. 227. Retracing faded name in clear ink; Dunn v. Clements, 7 Jones (N. C.) Law 58. See also Reed v. Roark, 14 Tex. 329; Turner v. Bellagram, 40 Mo. 464. So an attempted obliteration in lead pencil; Chase v. Washington Insurance Company, 12 Barb, 595. So writing in the words "and executed" after the word "signed;" Langdon r. Paul, 20 Verm. 217. An alteration in the marginal numbers of negotiable bonds is held to be immiterial; Commonwealth r. Emigrant Industrial Bank, 98 Mass, 12; Bersdell v. Russell, 29 N. Y. 220; City of Elizabeth v. Force, 29 N. J. Eq. 591. But the alteration of the number of a Bank of England note was held to be material; Suffell v. Bank of England, 9 Q. B. D. 555 (1882). It is an immaterial alteration to change the marginal figures of a note so that they shall conform to the written amount; Smith r. Smith, 1 R. I. 398. So the insertion of dollar mark before marginal figures; Houghton r. Francis, 29 Ill. 244. So adding words to a deed of conveyance which simply express the legal effect of the instrument; Brown v. Pinkham, 18 Pick. 172; Sharpe v. Orme, 61 Ala. 263. So writing in such words in a note; Scott v. Calkin, 139 Mass. 529 (1885). See, also, Belden v. Hann, 61 Iowa 42 (1883). So filling up immaterial blanks in a deed, or interlining or altering immaterial words; Vose v. Dolan, 108 Mass. 155; Harsky v. Blackmarr, 20 Iowa 171; Burnham v. Ayer, 35 N. H. 351; Gordon v. Sizer, 39 Miss. 805; Crawford v. Dexter, 5 Sawyer (C. C.) 201. So inserting the Christian name of the party by whose land the granted premises are bounded; Hatch v. Hatch,

9 Mass. 307. So substituting for the name of the sheriff as obligee of a bail bond, the name of the constable who served the writ. Hale v. Russ, 1 Me. 334. So writing in mere senseless words. Thus in Granite Railway Co. v. Bacon, 15 Pick. 239, the pavee of a note indorsed in blank, wrote the name of the accommodation indorser over his own name, and it was held to be an immaterial alteration. "As mere senseless words, written on a subsisting instrument complete in itself, they did not affect the terms, the effect, or the identity of the contract." Shaw, C. J. Compare Weaver v. Bromley (Mich.) 31 N. W. Rep. 839 (1887). The insertion of the name of the obligor in the body of the bond after execution is an immaterial alteration; Smith v. Crooker, 5 Mass. 538; Wilder v. Butterfield, 50 How. (N. Y.) 385; Bird v. Bird, 40 Me. 398. An alteration made to correct a mutual mistake is generally held to be immaterial. But see Taylor v. Taylor, 12 Lea (Tenn.) 714 (1883), contra. Thus changing the date to correspond with the intention of the parties; Duker v. Franz, 7 Bush 273. But see Bowers v. Jewell, 2 N. H. 543; Hamilton v. Wood, 70 Ind. 306 (1880); Gill v. Hopkins, 19 Ill. App. 74 (1886). See in support of this principle, Clute v. Small, 17 Wend. 242; Connor v. Routh, 7 How. (Miss.) 176; Hunt v. Adams, 6 Mass. 519; Boyd v. Brotherson, 10 Wend. 93; Pease v. Dwight, 6 How. 190; Harvey v. Harvey, 15 Me. 357; McRaven v. Harvey, 53 Miss. 542. In Rhodes v. Castner, 12 Allen 130, where a party to a contract for the sale of goods added his own signature to a memorandum signed by the other party, it was held that the alteration was immaterial.

Mere explanatory memoranda written on an instrument do not avoid it. Thus, "left with Mr. B. as collateral," indorsed upon a note; Bachellor v. Priest, 12 Pick. 399; so "subject to a contract made"; Cushing v. Field, 70 Me.* 50 (1880). See also Struthers v. Kendall, 5 Wright 214; Hubbard v. Williamson, 5 Ired. 397; Warlter v. Cubley, 2 Cr. & M. 151. So a memorandum of an independent and collateral agreement is immaterial. Thus in Cambridge Savings Bank v. Hyde, 131 Mass. 77 (1881) it was held, where a payee indorsed upon a note an agreement with the principal that after a certain date the rate of interest should be less, that this was merely collateral to and independent of the note, and that the surety would not be discharged thereby. See, also, Stone v.

White, 8 Gray 589; Tremper v. Wemphill, 8 Leigh (Va.) 62; Robinson v. Phoenix Insurance Co., 25 Iowa 450; Krouch v. Shonz, 51 Wis. 204; Jackson v. Boyles, 64 Iowa 428. In Dreyler v. Smith, 30 Fed. Rep. 754 (1887), this principle was extended to a memorandum of extension of time of payment written on the face of the note; and in Moore v. Macon Savings Bank, 22 Mo. App. 684 (1886), the decision was to the same effect, where a similar memorandum was indused upon the note. In Littlefield v. Coombs, 71 Mc. 110 (1880), this principle was even applied to a memorandum of a greater rate of interest written on the note with the consent of the principal, and the surety was held not to be discharged. Compare Nickerson v. Sweet, 135 Mass. 511 (1883). It has been held that the cutting off of a receipt from a boml does not avoid the instrument; Goodfellow v. Insler, 12 N. J. Eq. 355; Simms v. Paschall, 5 Ired. Law 276; Bryan c. Dver, 28 III, 188. See, also, Warner v. Spencer, 7 J. J. Marsh. 340; but in Hert v. Ochler, 80 Ind. 83 (1881), it was held that the erasure of an indorsement of payment of interest avoided the note. See, also, Johnston v. May, 76 Ind. 293 (1881). As to immiterial alterations in subscriptions of stock see Whittlesey v. Franz, 74 N. Y. 597. As to immaterial alterations in policies of insurance see Robinson v. Phoenix Insurance Co., 25 Iowa 430: Martin v. Insurance Co., 101 N. Y. 498 (1886).

10. Bona fide holders of negotiable paper. Estoppel. - The general principle is well established that the material alteration of negotiable paper avoids it, even in the hands of a subsequent innocent holder, and although the alteration cannot be discovered by the closest inspection; and in regard to altered paper, bonâ fide purchasers for value and innocent pavces stand on precisely the same footing; Agawam Bank r. Sears, 4 Gray 95; Wade v. Withington, 1 Allen 561; Adair v. England, 58 Iowa 314; Etna Bank r. Winchester, 43 Conn. 391; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392 (1878); Savings Bank v. Shaffer, 9 Neb. 1 (1879); Suffell v. Bank of England, 9 Q. B. D. 555 (1882); Hert v. Ochler, 80 Ind. 83 (1881); Jones v. Bangs, 40 Ohio St. 139 (1883); and most courts follow the views of the majority of the court in Master v. Miller in holding that a recovery cannot be had upon the instrument even in its original shape: Draper v. Wood, 112 Mass. 315; Citizen's Bank v. Richmond, 121 Mass. 110 (1876), and cases cited supra.

See, however, Worrall v. Gheen, 39 Penn. St. 388, contra, and cases cited supra as to alterations by the maker of a note being treated as acts of spoliation.

When negotiable paper is delivered in an incomplete shape the law is that innocent holders, both payees and purchasers for value, may recover, though the blanks have been filled up contrary to the instructions of the party to be charged; Putnam v. Sullivan, 4 Mass. 45; Androscoggin Bank v. Kimball, 10 Cush. 373; Violette v. Patton, 5 Cranch 142; Bank of Pittsburg v. Neal, 22 How. 96; Rainbold v. Eddy, 34 Iowa 440; Abbott v. Rose, 62 Me. 194; Smith v. James, 32 Ind. 202; Redlich v. Doll, 54 N. Y. 234; Overton v. Mathews, 35 Ark. 147 (1879); Wessell v. Glenn, 108 Penn. St. 104 (1884). In Snyders v. Van Doren, 46 Wis. 602, the court held, where a blank note was signed by a surety, and a new surety was procured by the principal, and the instrument was filled up as a joint note, that the first surety was not discharged. In Holmes v. Trumper, 22 Mich. 427, where a blank for the rate of interest was filled up, the note was held to be avoided, even in the hands of a subsequent innocent holder. So Charlton v. Reed, 61 Iowa 166 (1883), and Cronkhite v. Nebeker, 81 Ind. 319 (1882), where a blank for the place of payment was filled up. But it is hard to defend these cases either on principle or authority. If a bill or note is partly filled up, any alteration in the part so filled up avoids it; Ivory v. Michael, 33 Mo. 400; Ives v. Farmers' Bank, 2 Allen 236; Angle v. Northwest Mutual Life Insurance Company, 92 U.S. 330 (1875); Luellen v. Hare, 32 Ind. 211. See, also, Weyerbauser v. Dun, 100 N. Y. 150 (1885). And in McGrath v. Clark, 56 N. Y. 34, it was held that a note was avoided, even as to subsequent innocent holder, when in a blank for the place of payment were inserted the words "with interest."

When the instrument as executed is complete, and blank spaces left between the words are fraudulently filled up, the generally accepted doctrine is that the principle of estoppel cannot be invoked in behalf of a subsequent innocent holder; Greenfield Bank v. Stowell, 123 Mass. 196; Cape Ann Bank v. Burns, 129 Mass. 596; Redlich v. Doll, 54 N. Y. 34; McGrath v. Clark, 56 N. Y. 34; Knoxville Bank v. Clark, 51 Iowa 264; Washington Bank v. Ekey, 51 Mo. 272; McCoy v. Lockwood, 71 Ind. 319 (1880); Fordyce v. Kosminski, 3 S. W. Rep. 892

(Ark.) (1887). See, also, Holmes v. Trumper, Charlton v. Reed, and Cronkhite r. Nebeker, cited supra. The following cases, however, adopt the principle of estappel; Pagan v. Wylie, 1 Ross, Leading Cases, 110; Isnard c. Torres, 10 La. An. 103; Garrard v. Hadden, 67 Penn. St. 82; Blakey v. Johnson, 13 Bush 197 (1877); Yooum v. Smith, 63 III, 321 (1872). This doctrine has also been applied to the severing of memorandae isy to be detached; Zimmerman v. Rote, 75 Penn. St. 188 (1874); Noll v. Smith, 64 Ind. 511 (1878). See, also, Brown v. Reed, 79 Penn. St. 370 (1875). But see Wait r. Pomerov, 20 Mich. 425; Benedict v. Cowden, 49 N. Y. 396; Palmer v. Sargent, 5 Neb. 225; Davis v. Henry, 13 Neb. 497 (1882), contra. So, also, negotiable paper has been held not to be avoided in the hands of a subsequent innocent holder, by the erasure of conditions written on the instrument in pencel; Harvey r. Smith, 55 III. 224. See also Scihill v. Vaughan, 69 Ill. 257. Young v. Grote, 4 Bing. 253, is largely responsible for this dangerous extension of the doctrine of estoppel. For explanations of this case see the opinion of Cockburn, C. J., in Swan r. Australasian Co., 2 H. & C. 175; also Halifax Union v. Wheelwright, L. R. 10 Ex. 183. The facts of Young v. Grote were peculiar. First, the altered instrument was a check; second, the addition was made by a confidential clerk, who had been allowed by the drawer to fill up the check, so that any alterations or additions made afterwards would be in the same handwriting. In commenting upon this case in Greenfield Bank v. Stowell, cited supra, Gray, C. J., says: "If the negligence of the customer affords opportunity to a clerk or other person in his employ, to add to the terms of a draft, and thereby mislead the banker, the customer may well be held liable to the banker. But even as between customer and banker, the former has not been held liable for an unauthorized alteration or addition by a stranger; and that the signer of a note complete upon its face, and not entrusted by him to any person for the purpose of being filled up or added to, but afterwards altered without his authority or assent, by the insertion of additional words in blank spaces therein, should be held liable to an action on the note in its altered form, is unsupported by any English cases, and is opposed to the weight of the American authorities." In a very recent New York case, Crawford v. West Side Bank, 100 N. Y. 50 (1885), it was held that a check was avoided by a material alteration made by a confidential clerk to whom it had been entrusted. See, also, Belknap v. Bank of America, 100 Mass. 376.

11. Legal presumptions and burden of proof. — In a note of this kind it is perhaps unnecessary to do more than cite a few of the later and more prominent decisions upon a branch of the law of evidence which presents the greatest difficulty, and in regard to which there is so much disagreement among the courts of the various states. In England and Massachusetts the law is, that where there is an apparent alteration on negotiable paper or other parol contracts, the burden of proof is upon the plaintiff to show that the alteration was made before, or contemporaneously with, the execution of the instrument, but that there is no presumption of law as to the time when the alteration was made; 2 Taylor on Evidence, § 1819 (8th edition); Norwood v. Fairservice, Quincy, 189; Wilde v. Armsby, 6 Cush. 314; Ely v. Ely, 6 Gray 439; Newman v. Wallace, 121 Mass. 323 (1876). In Massachusetts it has been decided that it is not incumbent upon the plaintiff to explain an alteration before the introduction of the instrument in evidence, and that proof of the defendant's signature establishes a primâ facie case; Davis v. Jenny, 1 Met. 221; Agawam Bank v. Sears, 4 Gray 95. In Ely v. Ely, 6 Gray 439, the court say: "The alteration may be of such a character that the plaintiff may safely rely upon the paper itself and the subject-matter as authorizing the inference that the alteration was made before the execution, or he may introduce some very slight evidence to account for the apparent interlineations." In Simpson v. Davis, 119 Mass. 269 (1876), Endicott, J., says: "The same rule applies as where a want of consideration is relied on as the defence to a promissory note; the burden of proof is on the plaintiff, upon the whole evidence, to establish that fact." But where it appears on inspection that the alteration was made after execution, the jury may so infer notwithstanding the proof of signature, and without the introduction of any evidence on the part of the defendant to show that the alteration was made after execution; Wilde v. Armsby, supra. It has been held by the United States Supreme Court and the courts of several of the states that there exists a presumption of law that the alteration was made after execution; United States v. Linn, 1 How. 104; Simpson v. Stackhouse, 9 Barr 186; Hills v. Barnes, 11 N. H. 395; Dow v. Jewell, 18 N. H. 356; Miller v. Gilleland, 19 Pa.

St. 119; Neff v. Horner, 63 Pa. St. 327; and that the alteration must be explained below the instrument can be introduced in evidence; Burguin c. Budiop, 91 Pa. St. 336 (1879). On the other hand, it has been held by some of our courts that the law raises a presumption that the alteration was made at the time of the execution, and that where no evidence whatever is introduced by either side, the verdiet shall be for the plaintiff; Gooch v. Bryant, 13 Me. 386; Dodge v. Haskell, 69 Me. 429; Putnam v. Clark, 33 N. J. Eq. 338; Paramore v. Landsey, 63 Mo. 63; Johns v. Harrison, 20 Ind. 317; Wilson v. Harrys, 35 Iowa 507. The better rule seems to be that the question of the time of the alteration is for the jury upon all the evidence in the case, both intrinsic and extransic, and that there are no presumptions of law either way; but that the burden of proof is upon the plaintiff to show that the paper declared upon was duly executed in manner and form as set forth in the declaration. This, as has been seen, is the law prevailing in England and Massachusetts, and it is recognized by the majority of the courts of the United States; Beaman r, Russell, 20 Verm. 205; Cumberland Bank v. Hall, I Halst. 215; Tyree v. Rives, 57 Ala. 173; Chism v. Toomer, 27 Ark, 109; Corcoran v. Doll, 32 Cal. 89; Hayden v. Goodnow, 39 Conn. 164; Warren v. Layton, 3 Harr. (Del.) 404; Planters' Bank v. Irwin, 31 Ga. 371; McAllister v. Avery, 17 III. App. 568 (1885); Neil v. Case, 25 Kan. 510; Elbert v. McClelland, 8 Bush 577; Willett v. Shepard, 34 Mich. 106; Wilson v. Henderson, 17 Miss. 375; Bank v. Morrison, 17 Neb. 341; Pease v. Barnett, 27 Hun 378; Rogers v. Vosburgh, 87 N. Y. 228 (1881); Keen v. Monroe, 75 Va. 424 (1881).

In England and many of the states of this country, it is held that alterations in deeds are presumed to have been made before or contemporaneously with execution, and that the burden of proof is upon the defendant to prove that they were made subsequently; 2 Taylor on Evidence, § 1819 (8th edition); Doe v. Catomore, 16 Q. B. 745; Cox v. Palmer, 1 McCrary, 431 (1880); Little v. Herndon, 10 Wall, 26; Den v. Farlee, 21 N. J. L. 279; Gordon v. Sizer, 39 Miss. 805; Sharpe v. Orme, 61 Ala, 263; Stiles v. Probst, 69 Ill, 382; Feig v. Meyrs, 102 Pa. St. 10 (1881); Letcher v. Bates, 6 J. J. Marsh, 524. But in Massachusetts and some other states no distinction is made between alterations in deeds and alterations in parol con-

tracts; Ely v. Ely, 6 Gray 439; Prevost v. Gratz, Pet. (C. C.) 364; Herrick v. Malin, 22 Wend. 388; Acker v. Ledyard, 8 Barb. 514; Dow v. Jewell, 18 N. H. 340; Dolbier v. Norton, 5 Shepl. 307; Van Horn v. Bell, 11 Iowa 465; Deem v. Phillips, 5 W. Va. 168; Galland v. Jackman, 26 Cal. 79; Pipes v. Hardesty, 9 La. Ann. 152.

Alterations in ancient writings and official returns are presumed to have been rightfully and properly made; Wilbur v. Wilbur, 13 Met. 405; Shinn v. Hicks, Sup. Ct. Tex. 4 S. W. Rep. 486 (1887); Bell v. Brewster, Sup. Ct. Ohio, 10 N. E. Rep. 679 (1887); Trimlestown v. Kemmis, 9 Cl. & Fin. 763; Evans v. Rees, 10 A. & E. 151.

WAUGH v. CARVER, CARVER, AND GIESLER.

MICHAELMAS. = 34 GLO, 3, C. B.

[REPORTED 2 H. BL. 235.]

A. and B., ship-agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become liable, as partners, to all persons with whom either contracts as such a part, though the agreement provides that weither shall be answerable for the acts or losses of the other, but each for his own.

He who takes the general profits of a partnership must of necessity be made liable to the losses (a).

He who lends his name as a partner becomes, as against all the rest of the world, a partner.

This action of assumpsit for goods sold and delivered, work and labour done, &c., was tried at Guildhall, before the Lord Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated—

That on the 24th February, 1790, the defendants duly executed articles of agreement, as follows:—"Articles of agreement indented, made, concluded, and agreed upon this twenty-fourth day of February, in the year of our Lord one thousand seven hundred and ninety, between Erasmus Carver and William Carver, of Gosport, in the county of Southampton, merchants, of the one part, and Archibald Giesler of Plymouth, in the county of Devon, merchant, of the other part. Whereas the said Archibald Giesler, some time since, received appointments

⁽a) [This position is now untenable, see Wheatcroft v. Hickman, post. in $not\hat{a}$.]

from several of the principal ship-owners, merchants, and insurers in *Holland*, and other places, to act as their agent in the several counties of Hampshire, Devonshire, Dorsetshire, and Cornwall; and whereas the said Erasmus Carver and William Carver have for a great number of years been established at Gosport aforesaid, in the agency line, under the firm of Erasmus Carver and Son, and hold sundry appointments as consuls and agents for the Danish and other foreign nations, and also have very extensive connections in Holland and other parts of Europe; and whereas it is deemed for their mutual interest and the advantage of their friends, that the said Archibald Giesler should remove from Plymouth, and establish himself at Cowes, in the Isle of Wight: and the said Erasmus Carver and William Carver, and the said Archibald Giesler, have agreed that each should allow to the other certain portions of each other's commissions and profits, in manner hereafter more particularly mentioned and expressed. Now, therefore, this agreement witnesseth, and the said Archibald Giesler doth hereby for himself, his executors and administrators, covenant, promise, and agree, to and with the said Erasmus Carver and William Carver, their executors and assigns, in manner following (that is to say), that the said Archibald Giesler shall and will, when required so to do by the said Erasmus Carver and William Carver, remove from Plymouth and establish himself at Cowes aforesaid, for the purpose of carrying on a house there in the agency line, on his account; but in consequence of the assistance and recommendations which the said Erasmus Carver and William Carver have agreed to render in support of the said house at Cowes, the said Archibald Giesler doth covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that the said Archibald Giesler, his executors, administrators, and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed, to the said Erasmus Carver and William Carver, their executors, administrators, or assigns, one full moiety or half part of the commission agency to be received on all such ships or vessels as may arrive or put into the port at Cowes, or remain in the road to the westward thereof within the Needles, of which the said Archibald Giesler may procure the address, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs of such ships or vessels; and as there have been, for a

considerable time past, very general complaints made abroad of the malpractices and impositions that have prevailed at Course aforesaid, and it being a principal object of the said Erasmus Carver and William Carver to counteract and prevent such, the said Archibald Giesler doth further covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that he the said Archibald Giesler shall and will use his utmost diligence and endeavours to prevent ships or vessels arriving at the east end of the Isle of Wight, from being carried past the port of Portsmouth to that of Cowes; and also to induce the mariners or commanders of such ships or vessels as may come in at the west end of the island through the Needles, whenever it is practicable and advisable, to proceed to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, and that he will consult and advise with the said Erasmus Carver and William Carver on and respecting the affairs of such ships or vessels as may put into and remain at the port of Coves under the care of the said Archibald Giesler, and pursue such measures as may appear to the said Erasmus Carver and William Carver for the interest of the concerned. And whereas one of the causes of complaint before mentioned is the very heavy charge made at Cowes for the use of warehouses for depositing the cargoes of ships or vessels, the said Archibald Giesler doth also covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that they the said Erasmus Carver and William Carver shall be at full liberty to engage warehouses at Cowes aforesaid, on such terms and in such manner as they may think proper, in which the said Archibald Giesler shall not upon any grounds or pretence whatsoever either directly or indirectly interfere. And the said Erasmus Carver and William Carver, for the considerations hereinbefore mentioned, do hereby covenant, promise, and agree to and with the said Archibald Giesler, his executors and administrators, that they the said Erasmus Carver and William Carver shall and will well and truly pay or allow, or cause to be paid or allowed, to the said Archibald Giesler, his executors, administrators, or assigns, three fifth parts or shares of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels, the commanders whereof may, in consequence of the endeavours, interference, or influence of the

said Archibald Giesler, proceed from Cowes to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, in manner hereinbefore mentioned, and likewise one and one-half per cent. on amount of the bills of the several tradesmen employed in the repairs of such ships or vessels, together with one-fourth part of such sum or sums as may be charged or brought into account for warehouse rent, on the cargoes of such ships or vessels respectively; and also one-sixth part of such sum or sums as may be charged or brought into account for warehouse rent on the cargoes of such ships or vessels as may be landed at Cowes aforesaid: and also that they the said Erasmus Carver and William Carver, their executors, administrators, and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed unto the said Archibald Giesler, his executors, administrators, or assigns, onefourth part or share of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels that may arrive or put into the port of *Portsmouth*, or remain in the limits thereof, under the care and direction of the said Erasmus Carver and William Carver: and likewise one-half per cent. on amount of the bills of the several tradesmen employed in the repairs of such ships or vessels: and in order to prevent any misunderstanding or disputes, with respect to the commission and discount to be paid and divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, and for the better ascertaining thereof, it is hereby mutually covenanted, declared, and agreed upon between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that one-fifth part of the commission or agency on each ship shall and may be first retained by the party under whose care such ship or vessel shall be, as a full compensation for clerks, boat hire and all the other incidental charges and expenses in regard of such ships or vessels respectively; after which deduction, the then remaining balance of such commissions or agency shall be divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, in the proportions hereinbefore mentioned; and that such commission or agency shall be ascertained by one party's producing to the other true and authentic copies of the general accounts of each ship or vessel under their respective care and direction, signed by the several masters of such ships or vessels respectively, and notarially authenticated. And it is hereby further covenanted, declared, and agreed upon by and between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that this present contract and agreement shall commence and take effect from the date hereof, and shall continue in full force and virtue for the term of seven years, during the whole of which said term the said parties, or either of them, shall not upon any grounds or pretence whatsoever, directly or indirectly, enter into, or form any connection, contract, or agreement with any other house or houses, or with any person or persons whatsoever, concerning the commission or agency of ships or vessels that may during the said term put into or arrive at either of the before-mentioned ports of Portsmouth or Cowes, nor shall the said Archibald Giesler at the expiration of the said term of seven years, directly or indirectly, establish himself at Gosport or Portsmouth, nor on any grounds or pretences whatsoever, enter into or form any connection, contract, or agreement with any house or houses, or person or persons whomsoever at Gosport or Portsmouth aforesaid. And also that they the said Erasmus Carver and William Carver, and the said Archibald Giesler, shall and will meet at Gosport on or about the first day of September yearly, for the purpose of examining and settling their accounts, concerning the said commission business, and that such party from whom the balance shall then appear to be due, shall and will well and truly pay or secure the same unto the other party, his executors, administrators, or assigns, on or before the twenty-ninth day of the said month of September yearly. And it is hereby likewise covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that each party shall separately run the risk of, and sustain all such loss and losses as may happen on the advance of moneys in respect of any ships or vessels under the immediate care of either of the said parties respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall at any time or times, during the continuance of this agreement, be in any wise injured, prejudiced, or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be

answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall in his own person and with his own goods and effects respectively be answerable and accountable for his own losses, acts, deeds, and receipts. Provided always nevertheless, and it is hereby declared and agreed to be the true intent and meaning of these presents, and the parties hereunto, that in case the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler shall dissolve or cease to exist, from any circumstance whatsoever, before the expiration of the said term of seven years, that then this present agreement, and every clause, sentence, and thing herein contained, shall from thence cease, determine, and be absolutely void, to all intents and purposes whatsoever; but without prejudice nevertheless to the settlement of any accounts that may then remain open and unliquidated between the said Erasmus Carver and William Carver, and the said Archibald Giesler, which shall be settled and adjusted within the space of six months next after the dissolution of the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler; and also that at the expiration of the said term of seven years, it shall be at the option of the said Erasmus Carver and William Carver to renew this agreement for the further term of seven years, under and subject to the several clauses, covenants, and agreements hereinbefore particularly mentioned and set forth, which the said Archibald Giesler doth hereby engage to do. And it is hereby further covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver and Archibald Giesler, that these presents do not, nor shall be construed to mean to extend to such ships or vessels that may come to the address of either of the said parties respectively, for the purpose of loading or delivering any goods, wares, or merchandize, it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to bear reference to their particular or separate mercantile concerns or connections; and that in case any disputes or misunderstanding shall hereafter arise between them, respecting the true intent and meaning of any of the articles or covenants hereinbefore contained, that then such disputes or misunderstandings shall be submitted to the arbitra-

tion of two indifferent persons, one to be chosen by the said Erasmus Carver and William Carver, and the other by the said Archibald Giesler; and in case such two persons cannot agree about the same, then they are hereby empowered to name some third person as an umpire; and it is hereby declared and agreed, that the award and determination of the said referees and umpire, or any two of them, concerning the object in dispute, shall be made and settled within six calendar months next after such differences shall have arisen between the said parties, and shall be absolutely final, conclusive, and binding. And lastly, for the true performance of all and every the covenants, articles, and agreements hereinbefore mentioned, they the said Erasmus Carver and William Carver and Archibald Giesler do hereby bind themselves, their heirs, executors, and administrators, each to the other, in the penalty of five thousand pounds of lawful money of Great Britain, firmly by these presents."

In pursuance of these articles, Giesler removed from *Plymouth*, and settled at *Coves*, where he carried on the business of a ship-agent, in his own name, and contracted for the goods, &c., which were the subject of the action.

And the question was, whether the defendants were partners on the true construction of the article?

This was argued in Trinity term last, by Clayton, Serjt., for the plaintiff, and Rooke, Serjt., for the defendants; and a second time in the present term by Le Blanc, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendants. The substance of the arguments for the plaintiff was as follows:—

The question in this case is, Whether the articles of agreement entered into by the defendants constituted a partnership between them? That such was the effect of these articles will appear by considering the general rules of law respecting partners, and the particular circumstances in the case. The law is, that wherever there is a participation of profits a partnership is created; though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace* v. Smith, 2 Black. 998, a retiring partner lent the other who continued in business a certain sum of money at 5l. per cent., and was to have an annuity of 300l. a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner; but

Chief Justice De Grey, there said — "The question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson; or whether he only relied on those profits as a fund for payment?" And Blackstone, J., also said - "The true criterion, when money is advanced to a trader, is to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade. In the former case it is a loan, in the latter a partnership." In Bloxam v. Pell, cited in Grace v. Smith, a sum secured with interest on bond, and also an agreement for an annuity of 200l. a year for six years, if Brooke so long lived, as in lieu of the profits of the trade, with liberty to inspect the books, was held by Lord Mansfield to constitute a partnership. In Hoare v. Dawes, Dougl. 371, 8vo, a number of persons unknown to each other, and without any communication together, employed the same broker to purchase tea at a sale of the East India Company. The broker bought a lot, to be divided among them according to their respective orders, and pledged the warrants with the plaintiff, for more money than they turned out to be worth; on the broker becoming a bankrupt, the plaintiff sued two of the purchasers, considering them all as secret partners, and liable for the whole. But the Court held that there was no partnership, and Lord Mansfield said—"There is no undertaking by one to advance money for another, nor any agreement to share with one another the profit or loss. In Coope v. Eyre, 1 H. Bl. p. 37, one of the defendants bought a quantity of oil of the plaintiffs, and the other defendants had agreed, before the purchase, each to take certain shares of the quantity bought; but, when bought, each to do with his own share as he pleased; they were holden not to be partners, for there was no share of profit or loss. Young v. Axtell, and another (a), which was an action to recover 6001. and upwards for coals sold and delivered by the plaintiff, a coal-merchant, an agreement between the defendants was given in evidence, stating that the defendant Mrs. Axtell

⁽a) At Guildhall sittings after Hil., 24 G. 3, cor. Lord Mansfield, cited by Mr. Serjt. Le Blanc, from a MS. note.

had lately carried on the coal trade, and that the other defendant did the same: that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2s. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers in their joint names; and the question was, whether Mrs. Axtell was liable for the debt? Lord Mansfield said, "he should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at the time of dealing know that she was a partner, or that her name was used "(a). And the jury accordingly found a verdict for the plaintiff.

It appearing, therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen whether the agreement in question did not establish such a participation of the profits of the agency business between the defendants as to make them liable as partners. In the first place, it is stated in the recital, that the Carvers and Giesler had agreed to allow each other certain proportions of each other's commissions and profits. It is then agreed that Giesler should, when required by the Carvers, remove from Plymouth to Cowes, and there establish a house: and in consequence of the Carvers' recommendation and assistance to support the house, Giesler is to allow them a moiety of the commission on ships putting into the port of Cowes, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills employed on such ships: he also covenants to advise with the Carvers and pursue such measures as may appear to them to be for the interest of the concern. On the other hand, the Carvers agree to pay Giesler three-fifths of the agency of all vessels which shall come from Cowes to Portsmouth, and put themselves under the direction of the Carvers, by the recommendation of Giesler, one-half per cent. on tradesmen's bills, and certain proportions

⁽a) Sed quare; vide the expressions of Park, J., in $Dickinson \ v. \ Valpy$, 10 B. & C. 140.

of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connection in the agency business during the period agreed upon; and they are to meet once a year at Gosport to settle their mutual accounts, and pay over the balance. Now it was not possible to express in clearer terms an agreement to participate in the profits of the business of ship-agents, and to establish a joint concern between the two houses. It may be objected, that there is a proviso, that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. Lord Craven v. Widdows, 2 Chan. Cas. 139; Heath v. Percival, 1 P. Wms. 682; Rich v. Coe, Cowp. 636. An agreement to share profits alone, cannot prevent the legal consequence of also sharing losses, for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits, there shall also be a share of losses; for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have Thus, if in the year 1791 the profits were 1001., recourse. and in the year 1792 there was a loss of 10l., of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that, to constitute a partnership, the parties should advance money by way of capital; many joint trades are carried on without any such advance: there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

On behalf of the defendants, the arguments were as follows: The question is, Whether this agreement creates such a partnership as to make all liable to the debts of each? A partnership may be defined to be, "the relation of persons agreeing to join stock or labor, and to divide the profits." Thus Puffendorf described it, "Contractus societatis est, quo duo pluresve inter repecuniam, res, aut operas conferunt, eo sane, ut quod inde redit lucri inter singulos pro ratâ dividatur," lib. 5, cap. 8. Partners,

therefore, can only be liable on the ground of their being joint contractors, or as partaking of a joint stock. In many cases in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a re-sale, they shall be considered as joint contractors, and therefore liable as partners. So if a joint stock or capital or joint labor be employed, each party is interested in the thing on which it is employed, and in the profits resulting from it. But in the present case, there is no joint contract for the purchasing of goods, nor any joint stock or labor, but the parties are to share, in certain proportions, the profits of their separate stock, and separate labor: there was no house of trade or merchandise established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital, unless carried on as a capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers who entered into similar agreements to share the produce of their separate labor, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular address of one were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts, or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other against their express intent. But all cases of partnership which have been hitherto decided have proceeded on one or other of the following grounds: 1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in case of dormant partners, there has been an appearance of fraud in holding out false colors to the world. Now the present case is not within either of those principles: because there was no authority given to either party to contract for the others; nor was there any joint capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the court collect from the articles that any was intended: it was merely a purchase of Giesler's profits by giving him a share of those of the Carvers, to prevent a competition between them.

Lord Chief Justice *Eyre*.— This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and remove the only difficulty I felt, which was, whether, by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy? But I think this case will not lead to that consequence (a).

The definition of a partnership cited from *Puffendorf* is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B., whether they were partners or not, it would be very well to inquire, whether they had contributed, and in what proportion, stock or labour, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to

⁽a) [But see now the 28 & 29 Vict. c. 86, s. 3, post, in notâ.]

suppose that they lent their money upon the apparent credit of three or four persons when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon construction of the agreement, if it be construed between the Carvers and Giesler, that they were not, nor ever meant to be, partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not by parts of their agreement constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of Grace v. Smith (a), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise: upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason (b). I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship-agent employs tradesmen to furnish necessaries for the ship; he contracts with them,

(a) 2 Black. 998.

(b) [But see post, Wheateroft v. Hickman, in notâ. Before that decision, the principle laid down in Grace v. Smith was impugned with much learning by Mr. Lindley (now

Lindley, L. J.) in his valuable treatise on the Law of Partnership, pp. 34-40. The actual decision in *Grace* v. *Smith* was that the defendant was not a partner.] and is liable to them; he also makes out the bills in such a way as to determine the charge of commission to the ship-owners. With respect to the commission, indeed, he may be considered as a mere agent; but, as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true that he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of difficulty. For though, with respect to each other these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

Gould, J.—I am of the same opinion.

Heath, J.—I am of the same opinion.

Rooke, J., having argued the case at the bar, declined giving any opinion.

Judgment for the plaintiff (a).

Partnership is either actual or nominal. Actual partnership takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and loss. "I have always," says Tindal, C. J., in *Green* v. Beeseley, 2 Bing. N. C. 112, "understood the definition of partnership to be a mutual participation in profit and loss."

[But the question whether an agreement constitutes a partnership as between the parties to it giving them the rights and liabilities of partners, inter se, is totally different from the question whether a partnership is created, with its incident liabilities as regards third persons. The distinction is clearly put by Cotton, L. J., in Walker v. Hirsch, 27 Ch. D., at p. 467.

Primâ facte a mutual agreement to share profits and losses in certain proportions may be said to create a partnership as between the parties to it, though it may be questioned whether Kay, J., did not go too far in Parsey v. Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, in laying down that this is the inevitable result of such an agreement: see per Cotton, L. J., in Walker v. Hirsch, ubi supra, where it was held that no partnership was created. The court, however, will look to the effect of an agreement and not the mere wording of it, and an agreement may constitute a partnership, even as between

⁽a) See Coope v. Eyre, 1 H. Bl. p. 37, and the note there.

the parties to it, notwithstanding that it may contain an express provision to the contrary, *Moore v. Davis*, 11 Ch. D. 261.

A fortiori.] with respect to third persons, an actual partnership [may] subsist where there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents to that relation. See Bond v. Pittord, 3 M. & W. 357.1 Such stipulations [may] indeed hold good between himself and his companions, but will in no wise diminish his liability to third persons.

[The principle on which this was supposed to be founded was — to use the language of the L. C. J. in the principal case—that "by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for payment of their debts." This principle, although some have thought it inexpedient as a restraint upon the employment of money in commerce, was for a long time upheld; but now both the legislature and the highest court of appeal have pronounced it to be vicious.

It is now settled, that there may be a participation in profits, yet no partnership, even quood third persons. The real test of the liability of any one to third parties as a copartner is, whether er not the other person or persons conducting the business were his agents to carry it on. This was decided by the unanimous judgment of the House of Lords in Wheateroft and Cox v. Hickman, 9 C. B. N. S. 47, 8 H. of L. C. 268, 30 L. J. C. P. 125, overruling the authorities to the contrary, and reversing the decision in the same case of the Common Pleas, and of the Exchequer Chamber; in which latter court, however, the judges were divided in opinion, as also were the judges who delivered their opinions in the House of Lords.

The facts of the case were these: Messrs. Smith, who were partners as iron-merchants at the Stanton Iron Works, became insolvent, and a deed of arrangement was executed between them and their creditors. By this deed Messrs. Smith conveyed all their property to five trustees upon trust, to continue and carry on, under the name and style of the Stanton Iron Company, the business theretofore carried on by the Messes. Smith in copartnership. The deed then conferred upon the trustees powers to manage the works as they thought fit, and to renew leases, insure, erect buildings and machinery, appoint managers and agents, enter into and execute all contracts and instruments in carrying on the business (a provision clearly authorizing the trustees to make or accept bills of exchange), and to divide the net income of the business remaining, after the above purposes had been answered, amongst the creditors of Messrs. Smith, in rateable proportions, - provided that in distributing such income, it should be deemed the property of Messrs. Smith; with power for the majority in value of the joint creditors, at a meeting, to alter the trusts, and make rules as to the discontinuance of the business and the management of it, and ultimately after paying the debts incurred in the business so carried on, to divide the residue of the moneys, rateably, amongst the creditors, with the same provision that the moneys were to be considered the property of Messrs. Smith. The creditors were to receive the provisions of the deed in full discharge of their debts, and they covenanted not to sue. The defendants were creditors of Messrs. Smith, and they subscribed and executed this deed.

The trustees carried on the business in pursuance of the deed, under the name of the Stanton Iron Company, and the plaintiff having supplied the company with iron ore, one of the trustees accepted bills of exchange in the

name of the company for the price of it. The bills not having been paid at maturity, the plaintiff sued the defendants as acceptors.

The real question was whether the deed made the defendants partners with the trustees, or what is the same thing, agents to bind them by their acceptances on account of the business, and the Lords present (Lords Campbell, C., Brougham, Cranworth, Wensleydale, and Chelmsford) unanimously held that such agency was not established by the deed and that the defendants were not liable.

"It is often," observed Lord Cranworth, "said, that the tests, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to the profits or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing that entitles him to the one, makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors.'

His lordship then proceeded to show that Waugh v. Carver, Bond v. Pittard, supra, and Barry v. Nesham, 3 C. B. 641, applying to them the test enunciated by him, were correctly decided.

"The law," said Lord Wensleydale, "as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. A man who orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent: and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade and share the profits, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this

is the true principle of partnership liability. Perhaps the maxim that h. who takes the profits ought to to it the loss, often stated in the earlier cases on this subject — Wangh v. Circir. xc.,—is only the cors come not the cause, why a man is made habe as a partner. Can we collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed, constitutes the a has agent for corrowing on the business for his account and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for if it is profitable they will get their orbits paid, but this is not that sharing of profits which constitutes the relation of principal, agent, and partner."

See further Kilshaw v. Jukes, 3 B. & S. 847; and Buffen v. Shorp, Cam. Seac. L. R. 1 C. P. 86; 35 L. J. C. P. 105, in which the above rations decidendi were acted upon.

In the latter case the opinion of the majority of the Court of Exchequer Chamber, reversing a judgment of the Common Pleas, was against the liability of a trustee under a marriage settlement by which the trustee was to receive all the profits of the husband's business of an underwriter, in trust in the first place to pay himself an annuity, for which the husband was liable before the settlement, and afterwards for the objects of the settlement.

The same rule was followed in In re The English &c. Invertor Company. 1 H. & M. 85, where participation in bonuses was held not to make policy holders liable as partners; and in Shaw v. Galt, 16 Ir. C. L. Rep. 357, where a clerk who was entitled to a fixed salary, and also to one-third of the net profits of the business, was held not hable to creditors as a partner in the business.

Noakes v. Barlow, 20 W. R. 383, 26 L. T. N. S. 136 is an example of circumstances held to create an agency of this sort. The defendant and a builder had made an agreement by which the latter was to erect certain houses, providing the plan, &c., for which the defendant was to supply the funds, which were to be paid into a bank on their joint account, the builder being entitled to draw 40s, per week for personal expenses during the erection. Both parties were to be jointly interested in the houses, which on completion were to be sold, and an account of profit and loss was to be taken between the two. The builder purchased materials, &c., for the houses on credit from the plaintiff, and in an action by the latter for the price, Brett, J., ruled that the agreement did not constitute a partnership so as to authorise the builder to pledge the defendant's credit. On a bill of exceptions the Court of Exchequer Chamber, whilst adhering to the ratio decidendi in Cox v. Hickman, that "sharing in profits and loss does not in itself constitute a partnership, but only affords a strong presumption that the one party is made the agent for the other," held that in this case the agreement did constitute the builder the defendant's agent, to pledge the credit of the latter, and therefore that the above ruling was wrong. See also Exparte MacMillan, 24 L. T. N. S. 143. The case of Kelly v. Scott, 49 L. J. Ch. 383, is one in which it was held that under a somewhat similar agreement a partnership liability quond third persons was not thereby created.

The question what constitutes a partnership as against third persons and of the Partnership Act, 1865, which will be presently noticed, was very fully discussed in *Holme v. Hammond*, L. R. 7 Ex. 218, 41 L. J. Ex. 157. There, by articles of partnership, it was provided that in case of the death of a partner in an auctioneer's business, the surviving partner should carry on the

partnership, and should pay the representatives of the deceased partner his share of the profits up to the end of the term for which the partnership was created. At the decease of one of the partners there was no capital in the business - except the office fittings and furniture - and his executors subsequently interfered in no way in the business; but they registered an account of, and were credited with profits earned before and after the death of their testator. It was sought to make them chargeable as partners in the business, and the Court unanimously held that they were not so liable under the circumstances. Martin and Bramwell, B. B., cite with the highest approval the effect of Cox v. Hickman, as stated by O'Brien, J., in Shaw v. Galt, as follows: "The principle to be collected from them appears to be that a partnership even as to third parties is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business, but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others." Kelly, C. B., seems in his judgment to repudiate to some extent agency as a test of partnership liability, and Cleasby, B., objects to the passage from the judgment of O'Brien, J., that "in the common case of a partnership where by the terms of the partnership all the capital is supplied by A., and the business is to be carried on by B. and C. in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management, that he shall neither buy nor sell nor draw nor accept bills, no one would say that as among themselves there was any agency of each one for the others."

The ratio decidendi in Cox v. Hickman was again followed in Mollwo, March & Co. v. The Court of Wards, L. R. 4 P. C. 419. This last was a strong case; for the rajah, whom the appellants sought unsuccessfully to charge as a partner, had a considerable amount of control over the business as well as a commission on all net profits made by the firm equal in proportion to one-fifth of their amount. But the Court held "that although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where from such perception alone it may as a presumption, not of law, but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. . . . Wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract." In that case, however, their lordships thought that "the agreement on which it was sought to establish the alleged partnership was in substance founded on the relation of creditor and debtor, and established no other."

See also Ex parte Davis, 4 De G. J. & S. 523, and Gill v. Manchester Railway Company, L. R. 8 Q. B. 186, 191, where it was held that a working agreement between two companies, even if it "did not constitute an actual partnership between the respective companies as to all the matters embraced by it," still did bring the defendants (one of the companies) "within the rule expressed by Lord Cranworth in Cox v. Hickman: 'The real ground of liability is that the trade has been carried on by persons acting on his (the defendant's) behalf."

Without attempting to draw any hard and fast line to define what circumstances constitute a partnership by agency (quoad third persons, see Walker v. Hirsch, 27 Ch. D. 460, and Lindley on Partnership, 4th ed. pp. 38 et seq.), the

effect of *Cox v. Hickman* as followed by the later cases seems to be that to establish the liability of a person as partner to the creditors of a firm it is necessary to look at all the circumstances establishing relations between him and his alleged partners with reference to the business; and that the mere receipt of profits is only one strong fact, which does not in itself constitute the receiver a partner, but is only evidence liable to be rebutted or supported by the other facts of the case. See *Badebey v. Consolidated Bank*, 34 Ch. D. 536; *Fronde v. Williams*, 56 L. J. Q. B. 62.

If the whole facts show that the person sought to be charged authorised the carrying on of the business on account and for the benefit of himself, then he is liable as a partner would be, and he can no more avoid responsibility to third persons by showing that he had stipulated with the ostensible partners that he should not be liable for the debts of the firm than could any other concealed principal by stipulations with his own agent avoid liability to third parties on contracts effected by that agent on his behalf within the authority given by him. But it is obvious that it is almost impossible to define accurately what are the states of circumstances which establish the relations in this sense of principal and agent. Capital embarked, powers of interference in the business, profits received, are all circumstances to be taken into consideration in deciding the question. See Cox v. Hickman, 9 C. B. X. S. 85, per Pollock, C. B.; Mollwo, March & Co, v. The Court of Ward, L. R. 4 P. C. 435; Ross v. Parkyns, L. R. 20 Eq. 331, 44 L. J. Ch. 610.

Since the above remarks were written, the subject has been exhaustively discussed in *Pooley* v. *Driver*, 5 Ch. D. 458, 46 L. J. Ch. 466, by Jessel, M. R., whose judgment has been further considered by the Court of Appeal in *Expirte Tennant*, In re Howard, 6 Ch. D. 303, and in *Expirte Delhasse*, In re Meyerand, 7 Ch. D. 511. The judgments in those three cases, it is submitted, fully support the doctrine which in the last two paragraphs it was attempted to enunciate. See especially the judgment of Cotton, L. J., in *Expirte Tennant*, at p. 315. "I take it," says his lordship, "the law is this: that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a joint business; or, putting it in another way, whether the parties were carrying on the business as principals and as agents for each other, whether it is a joint business or the business of one only."

The Master of the Rolls, however, in *Pooley v. Driver*, indicates an opinion that the test of agency is of no avail, because in the sense in which it must be used, the term "agent" is, his lordship considers, simply co-extensive with that of partner. He lays down generally as follows: "If we find an association of two or more persons formed for the purpose of carrying on in the first instance or continuing to carry on business, and we find that those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority (the House of Lords in *Cox v. Hickman*), those persons are to be treated as partners in that business, unless there are surrounding circumstances to show that they are not really partners. That, of course, brings me again to another question, which must always be considered, and that is, whether looking at the contract as a whole, it is intended to secure the benefit of a partnership with or without its liabilities, or whether it is not intended that the benefits of a partnership shall be secured."

In Ex parte Tennant, In re Howard, 6 Ch. D. 303, the Court of Appeal came to the conclusion that although there was a contract by which the supposed partner was to have a share in the profits of a business carried on by his son, the whole circumstances must be looked at, and these negatived any intention in the parties to create a partnership. (Another case where the facts were held to negative a partnership is Deane v. Harris, 33 L. T. N. S. 639.)

In Ex parte Delhasse, In re Megevand, 7 Ch. D. 511, the same Court came to an opposite conclusion as to the true inference to be drawn from the facts of that case, and held that a partnership was created.

In the latter case Thesiger, L. J., cites Lord Cranworth as giving "as the test that which no doubt must now be taken as the proper test to be applied in all these cases, namely, that the real ground of liability as a partner is, that the trade has been carried on by persons acting on behalf of the person whom it is attempted to make liable as a partner. But," adds Lord Justice Thesiger, "in the very same page in which those words occur, Lord Cranworth also says that the participation in profits is in general a sufficiently accurate test, and that the right of participation in profits affords cogent, often conclusive evidence of a partnership. If that be so, it follows as a logical consequence, that if in addition to participation in profits the arrangement provides for a participation in losses, and also certain stipulations tantamount to the ordinary stipulations which one would expect to find in the case of a dormant partner, it is an a fortiori reasoning in such a case in favour of a partnership."

In the recent case of *Frowde* v. *Williams*, 56 L. J. Q. B. 62, it was held that the agreement did constitute a partnership.

It should be observed that in Cox v. Hickman and Bullen v. Sharp the amount of profits receivable was limited, viz., to the amount of the respective defendants' debts, and doubts have been expressed as to whether those decisions would be binding where the participation in profits was unlimited. But in Holme v. Hammond, L. R. 7 Ex. 218, where the latter was the case, the Court of Exchequer declined to draw any distinction on that ground, nor did the Court of Appeal in Ex parte Tennant, ubi sup. In Cox v. Hickman, 9 C. B. N. S. 47, 100, Lord Wensleydale says, "The trustees (under the deed) are certainly liable, because they actually contract by their undoubted agent." For two cases where trustees under inspectorship and composition deeds have been held not liable, see Redpath v. Wigg, L. R. 1 Ex. 335, 35 L. J. Ex. 211; Easterbrook v. Earther Pook v.

On the above principles it is that a dormant partner, i.e., a partner whose name does not appear to the world as part of the firm, is held responsible for its engagements, even to those who, when they contracted with the firm, were ignorant of his existence. Exp. Gellar, Rose, 297; Wintle v. Crowther, 1 C. & P. 316; 1 Tyrw. 210; Robinson v. Wilkinson, 3 Price, 538; [Bottomley v. Nuttall, 5 C. B. N. S. 122; per Blackburn, J., Kilshaw v. Jukes, 3 B. & S. 847].

In one respect, however, there exists very considerable difference between the liabilities of an *ostensible* partner and those of a *dormant* one; for the liability of a partner who has appeared in the firm, in respect of the acts and contracts of his co-partners, continues even after the dissolution of the partnership, and the removal of his name therefrom, until *due notice* has been given of such dissolution. See *Parkin* v. *Carruthers*, 3 Esp. 248; *Graham* v. *Hope*, Peake, 154.

And though, as far as the public at large are concerned, notice in the Gazette

is held sufficient for this purpose, ticolfrey v. Turnhall, 1 Esp. 371; Wrightson v. Pullon, 1 Stark, 375; Brodie v. Howard, 17 C. B. 123, yet, to persons who have dealt with the firm, more specific information must be given. Kirwan v. Kirwan, 4 Tyrw, 491. And this is generally effected by circulars. See Newsome v. Coles, 2 Camp. 617; Jenkius v. Blizard, 1 Stark, 418. But if a fair presumption of actual notice can be raised from other circumstances, that will be sufficient. M'Iver v. Humble, 16 East, 169. Thus, a change in the wording of chaques has been held notice to a party using them. Berfaut v. Goodhall, 3 Camp. 147.

But it is not to be taken as a legal incident of the position of a dormaint partner, but rather as a probability arising from the greater likelihood of his share in the firm being unknown to those who deal with it, that his liability ceases upon the actual dissolution of the partnership, whilst that of an ostensible partner continues, towards persons who have no notice of the dissolution; for although generally speaking, a dormant partner may retire without giving notice to the world, Heath v. Sansom, 4 B. & Ad. 172; yet, even such a partner remains liable to persons who became aware of his partnership whilst it lasted, and continued their dealings with the firm under the belief that he still remained a member of it. If such persons were not made aware of the dissolution, it might be inferred that they dealt on the faith of the partnership; and, as to them, unless the circumstances of the case rebutted such an inference, even a dormant partner would still be liable. Econs v. Drummond, 4 Esp. 89. Lord Kenyon; Carter v. Whalley, 1 B. & Ad. 13, per Littledale and Parke, JJ.; Farrar v. Definae, 1 Car. & K. 580, Cresswell, J.

[As to the application of the doctrine of reputed ownership in case of the bankruptcy of an ostensible partner, see Ex parte Hayman, in re Pulsford, 8 Ch. D. 11, 47 L. J. Bank. 54.

The case of Cox v. Hickman was soon followed by the statute already referred to, effecting in certain instances therein specified a dissolution of the principle laid down in Wangh v. Career.

By that statute, 28 & 29 Vict. c. 86, s. 1, "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from earrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

"In order to bring a case within the Act there must be a contract in writing, and, according to my reading of the Act, the contract must on the face of it show that the transaction is a loan," per Lord Chelmsford, in Syers v. Syers, 1 App. Cas. 185, in which case is discussed the effect of a letter undertaking "to execute a deed of copartnership for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86." In Pooley v. Driver, 5 Ch. D. 458: 46 L. J. Ch. 466, it was decided by Jessel, M. R., that the contract in writing must be signed by any party seeking to have the benefit or protection afforded by the act, and that "the advance of money by way of loan" must not only profess to be by way of loan, but must be a real loan.

The last proposition, that in each case the whole contract must be considered to see whether a real loan was intended is sustained by the judgments in the Court of Appeal in *Ex parte Tennant*, 6 Ch. D. 303, and in *Ex parte Delhasse*, re Megevand, 7 Ch. D. 511. See also Fronde v. Williams. 56 L. J.

Q. B. 62, where Denman, J., lays down that "it is good *primâ facie* evidence of a partnership if there be an agreement that when the business is to be carried on there is to be a sharing of the profits."

Before setting forth the 2nd section, it will be better to state the effect of the law before the act was passed. The participation in profits which was held to constitute a partnership was, that of a person having a right to a share of the profits and to an account in order to ascertain his share, not that of a mere servant or agent receiving, in respect of his wages, a sum proportioned to a share of the profits, or which might be partly furnished out of the profits. The distinctions on this subject ran very fine, and in previous editions of this work, the principal cases were reviewed at some length, in the endeavour to classify them.

It will be sufficient now to state the result of the principal cases, which seems to have been,] that whenever it appeared that the agreement was intended by the parties themselves as one of agency or service, but the agent or servant [was] to be remunerated by a portion of the profits, then the contract [was] considered as between themselves one of agency (see Geddes v. Wallace, 2 Bligh, 270; R. v. Hartley, Russ. & R. 139), but, as between them and third persons, one of partnership. See Smith v. Watson, 2 B. & C. 407; Ex parte Rowlandson, 1 Rose, 91; Green v. Beesley, 2 Bing. N. C. 110; Ex parte Langdale, 18 Ves. 300; [Wheatcroft v. Hickman, supra; Walker v. Hirsch, 27 Ch. D. 460.]

But if the agent or servant [was] to be remunerated, not by a portion of the profits, but, as in *Dry* v. *Boswell*, 1 Camp. 329, *Dixon* v. *Cooper*, 3 Wils. 40, and *Wilkinson* v. *Frasier*, 4 Esp. 182, by part of a gross fund or stock which [was] not altogether composed of the profits, the contract, *even as against third persons*, [would have been] one of [ordinary] *agency*, although that fund or stock [might] include the profits, so that its value, and the *quantum* of the agent's reward, [would] necessarily fluctuate with their fluctuation.

There was a third case, that, viz., in which the agent or servant was not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantum of the profits. In such a case Lord Eldon expressed his opinion, that the agent so remunerated would not be a partner, even as to third persons. "It is clearly settled," said his lordship, in Ex parte Hamper, 17 Ves. 112, "though I regret it, that if a man stipulates that he shall have as the reward of his labour, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner." In another part of the same case he says — "The cases have gone to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that if a trader agree to pay another person, for his labour in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner. But if he has a specific interest in the profits themselves, he is a partner." 17 Ves. 404. See Ex parte Watson, 19 Ves. 461; [Harrington v. Churchward, 29 L. J. Cha. 521; and Lyon v. Knowles, 3 B. & S. 556; 32 L. J. Q. B. 74.

The 2nd section of the act provides as follows: "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall,

of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

By the 3rd section, "No person being the widow or child of the deceased partner of a trader, and receiving by way or annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader." This section meets the case put by the Lord Chief Justice in the leading case, p. 894.

The 4th section enacts, that "No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business." In relation to this section, see *Rawlinson v. Clarks, 15 M. & W. 292; and *Barry v. Nesham, 3 C. B. 641, a case to which it should seem this section would not apply. That case was recognised in *Wheateroft v. Hickman, supra.

The words of section 5 are: " In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied." See on this section Ex parte Mills, L. R. 8 Ch. 569. It does not deprive the lender of the benefit of any mortgage he may have taken for such loan, so as to be postponed in respect of it to the claims of the mortgagor's other creditors. Ex parte Sheil, in re Lonergan, 4 Ch. D. 789, 46 L. J. Bank, 62, overruling Ex parte Movarthur, 40 L. J. Bkey, 86. And see Buddey v. Consolidated Bank, 34 Ch. D. 536. But the words of the section do not "confine the restriction to coming in in competition with creditors in respect of the particular trade or creditors whose debts are contracted while that trade is going on. The words are general." Per Cotton, L. J., in Exparte Taylor, 12 Ch. D. at p. 376.

By section 6, the word "person" as used in the act is made to include a partnership firm, a joint stock company, and a corporation.

It may be remarked that the principle on which $Cox\ v$. Hickman was decided is broad enough to include a large number of cases not included in the statute: for instance, to entitle a person who may have lent money to the benefit of the act, s. 1, there must be a contract in writing. On this it has been attempted to found an argument, which was urged in $Holme\ v$. Hickman must be taken either to be evidence that the decision in $Cox\ v$. Hickman was not so broad as it has been supposed to be, and as it is above stated, or else to have effected a statutory limitation to that decision, and that in all cases not specifically provided for by the act the receipt of profits must create a partnership liability as had been supposed to be the case before $Cox\ v$. Hickman.

The argument was unavailing. Kelly, C. B., observes in his judgment that "it seems to him that the effect of the statute is merely that as respects the protected classes the sharing in profits shall be no evidence at all of a con-

tract of partnership, whereas with regard to others it is evidence, though insufficient of itself to establish the liability."

With great humility the act does seem to contemplate the receipt of profits being given in evidence, even in the specified cases: for it provides that the receipt of the profits shall not " of itself" and again " by reason of the receipt only" constitute a partnership.

It is submitted that the distinction may be that in the cases specified by the act the receipt of the profits, though admissible in evidence, is insufficient per se to establish the liability, whereas in other cases, it may be, to repeat Lord Cranworth's words, "cogent and often conclusive evidence," and amply sufficient even per se if not rebutted, though liable to be rebutted by the other circumstances of the case. In this way the act would be a step in advance of Cox v. Hickman. And see per Thesiger, L. J., in Ex parte Delhasse, 7 Ch. D. 531.

Bramwell, B., however, in his judgment takes a bolder line. "It is asked, if the defendants are not liable, what was the use of the 28 & 29 Vict. c. 86? If I say none, it would only show that the act was useless. In truth it was passed before the effect of *Cox v. Hickman* was understood," and this would seem to be the inclination of the opinion of Jessel, M. R., in *Pooley v. Driver*, 5 Ch. D. pp. 484–6.

In Mollwo, March & Co. v. The Court of Wards, L. R. 4 P. C. 419, this point was raised before the Privy Council, but their lordships in their judgment (p. 437) say "the enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence." With this criticism the M. R. in Pooley v. Driver expresses his concurrence.

With respect to nominal partnership:—that takes place where a person, having no real interest in the concern, allows his name to be held out to the world as that of a partner, in which case the law imposes on him the responsibility of one to persons who have had dealings with the firm of which he has held himself out as a member. (See the judgment of the Lord Chief Justice in the principal case; and Guidon v. Robson, 2 Camp. 302.)

It has, as we have seen, been laid down in *Young* v. *Axtell*, cited in the text, that it makes no difference in such a person's liability that the party seeking to charge him did not know at the time when he gave credit to the firm that he had so held himself out.

But this position appears very questionable; for the rule which imposes on a nominal partner the responsibilities of a real one is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm of which he holds himself out as a member, on the faith of his apparent responsibility. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies, and there is not wanting authority opposed to such an extension of the rule respecting a nominal partner's liability. "If it could be proved," says Parke, J., "that the defendant held himself out—not to the world, for that is a loose expression—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable." Dickenson v. Valpy, 10 B. & C. 140.

So too in Shott v. Streatfield, 1 M. & Rob. 9, where the question was whether Green was liable jointly with Streatfield, a witness proved that he had been

told in Green's presence that Green had become a partner. He was then asked whether he had repeated the information, on which Campbell objected that this was not evidence, unless it were shown that the defendants, or one of them, were present when it was repeated; so a per Lord Tenterden, C. J., "I think it is; because otherwise it will be sail presently, that whet was said was confined to the witness, and that the plaintiff could not have acted on it."

In Alderson v. Popes, 1 Camp. 404, n., it was held, that a man could not be charged as a partner by one who, when he contracted, had notice that he was but nominally so. The reason of this must have been, because he could not have been deceived, or induced to deal with the firm, by any reliance on the nominal partner's apparent responsibility. And the same reason precisely applies, whether the false impression on the customer's mind have been put an end to by a notice, or whether in consequence of his ignorance that the nominal partner's name had been used no false impression ever existed on his mind at all. (See Carter v. Whalley, 1 B. & Ad. 11; Ford v. Whitmarch, Exch. Mich. 1841; 1 Hurls. & Walm. 53; Pott v. Eyton, 3 C. B. 32; [Edmundson v. Thompson, 31 L. J. Exch. 207; Stephens v. Reynolds, 2 Fost, & Fig. 147.])

However, in order to fix a person with this description of liability, no particular mode of holding himself out is requisite. If he do acts, no matter of what kind, sufficient to induce others to believe him a partner, he will be liable as such. See Spencer v. Belling, 3 Camp. 310; Parker v. Barker, 1 B. & B. 9; 3 More, 226; [Gurney v. Evans, 3 H. & N. 122; Ex parte Good, in re Armitage, 5 Ch. D. 46, 46 L. J. Ch. 65; Ex parte Hagman, in re Pulsford, 8 Ch. D. 11, 47 L. J. Ch. Bank. 51, and see Hogarth v. Latham & Co., 3 Q. B. D. 643.]

But a man who describes himself as a partner with another in one particular business does not thereby hold himself out as such in any other business which that other may happen to profess. *Re Berkom* v. *Smith*, 1 Esp. 29; *Ridgway* v. *Philip*, 5 Tyrw. 131.

Nor is a person liable as a nominal partner, because others, without his consent, use his name as that of a member of their firm, even although he may have previously belonged to it, provided he have taken the proper steps to notify his retirement. *Newsome* v. Coles, 2 Camp. 617.

Nor, as has been already stated, can a man be charged as a member of the firm by one who had express notice that he was but nominally so. *Alderson* v. *Popes*, 1 Camp. 404, *in notis*.

The test of partnership laid down.— The law in America upon this subject is in an unsatisfactory state. The doctrine laid down in Waugh v. Carver, that an indefinite participation in profits makes one a partner as to third persons, because by such participation the fund on which creditors rely is diminished, was formerly quite generally accepted in this country, though not always without some modification; 3 Kent, *27; Dob v. Halsey, 16 John. 40; Manhattan Brass Co. v. Sears, 45 N. Y. 797; Leggett v. Hyde, 58 N. Y. 272; s. c. 17 Am. Rep.

244; Wood v. Vallette, 7 Ohio St. 172; Bromley v. Elliot, 38 N. H. 287, 306; Parker v. Canfield, 37 Conn. 250; Everett v. Chapman, 6 Conn. 347; Bigelow v. Elliot, 1 Cliff. 28; Winship v. Bank of U. S., 5 Pet. 560; Appleton v. Smith, 24 Wis. 331; Sheridan v. Medara, 10 N. J. Eq. 469; Lengle v. Smith, 48 Mo. 276; Bailey v. Clark, 6 Pick. 372; Sager v. Tupper, 38 Mich. 258; Strader v. White, 2 Neb. 348; Dalton City Co. v. Hawes, 37 Ga. 115; Buckner v. Lee, 8 Ga. 285; Brown v. Higginbotham, 5 Leigh (Va.) 583; Cox v. Delano, 3 Dev. N. C. 89; Rowland v. Long, 45 Md. 439; Purviance v. McClintee, 6 S. & R. 259; Brigham v. Dana, 29 Vt. 1, 9; Wright v. Davidson, 13 Minn. 449; Brown v. Cook, 3 N. H. 64. For a late case which quotes with approval the opinion that a communion of profits implies a communion of loss, see Bloomfield v. Buchanan, 13 Or. 108 (1885).

Limitations of rule: gross and net profits. — Among the limitations or modifications which have been made upon the broad rule of Waugh v. Carver, is the idea that while a sharing of net profits makes one liable as a partner, such liabilities do not follow from a sharing of gross profits; St. Denis v. Saunders, 36 Mich. 369; Gass v. New York, Providence & Boston R. R. Co., 99 Mass. 220; Chapman v. Eames, 67 Me. 452; Cutler v. Winsor, 6 Pick. 335; Turner v. Bissell, 14 Pick. 192; Chase v. Barrett, 4 Paige, 148, 159; Bowman v. Bailey, 10 Vt. 170; Pattison v. Blanchard, 1 Seld. 186; Merrick v. Gordon, 20 N. Y. 93; Butterfield v. Lathrop, 71 Pa. St. 225; Ellsworth v. Tartt, 26 Ala. 733. This distinction between sharing gross and net profits as a test of partnership, has been severely criticised; Story on Part., 7th ed. § 36 n.; 3 Kent, *25, n. [12th & 13th eds.].

Some cases, while apparently following the distinction between gross and net profits, have so modified it as to place the decisions on firmer grounds; Thompson v. Snow, 4 Grnl. 264; Loomis v. Marshall, 12 Conn. 69; Donnell v. Harshe, 67 Mo. 170; Musser v. Brink, 68 Mo. 242.

A division of profits means net profits; Connolly v. Davidson, 15 Minn. 519.

Sharing profits as profits.—Another distinction applied to the rule of Waugh v. Carver, and closely connected with that between gross and net profits, was that one was to be held liable as a partner when he was entitled to a share of the profits as profits, but not if he was merely to receive payments which were to vary with the profits, or a sum equal to a certain part of the profits. This gave opportunity for making extremely fine distinctions; Brockway v. Burnap, 16 Barb. 309; Pierson v. Steinmyer, 4 Rich. L. 309; Loomis v. Marshall, 12 Conn. 69; Turner v. Bissell, 14 Pick. 192; Miller v. Bartlett, 15 S. & R. 137; Irwin v. Bidwell, 72 Pa. St. 244; Eastman v. Clark, 53 N. H. 276; Benson v. Ketchum, 14 N. Y. 331, 355; Miller v. Bartlett, 15 S. & R. 137. For other cases showing modifications of the rule in Waugh v. Carver see cases cited infra in regard to a share of the profits being given as compensation for services, as rent, as interest, &c.

Modification of rule in different states.—Some states have modified the rule as laid down in Waugh v. Carver, or have reversed the earlier decisions which followed that case.

New York: The general rule of Waugh r. Carver is still stated to be law, but certain limitations have been made; Central City Says, Bank v. Walker, 66 N. Y. 424; Richardson v. Hughett, 76 Id. 55; s. c. 32 Am. Rep. 267; Eager v. Crawford, 76 Id. 97; Burnett v. Snyder, 81 Id. 550; s. c. 37 Am. Rep. 527. This case holds: "We have in this state adhered to the general doctrine established by the earlier English cases; and although it proceeds upon reasons which have not been considered entirely satisfactory, it was applied by this court in the recent case of Leggett v. Hyde, 58 N. Y. 272. But the participation in the profits of a trade which makes a person a partner as to third persons is a participation in the profits as such, under circumstances which give him a proprietary interest in the profits before division as principal trader, and the right to an account as partner and a lien on the partnership assets in preference to individual creditors of the partner." This opinion does not seem consistent with itself. It is held in New York that one does not become liable as partner because he is "to receive a share of the profits as a compensation for his services, or for money loaned for the benefit of the business." Curry v. Fowler, 87 N. Y. 33; Cassidy v. Hall, 97 Id. 159.

Ohio: Harvey v. Childs, 28 Ohio St. 319 approves Cox v. Hickman, instead of following Wood v. Valette, 7 Ohio St. 172. See Farmers' Ins. Co. v. Ross, 29 Ohio St. 429.

Pennsylvania: The statute of April 6th, 1870 (Purdon 1299, pl. 16, and 1300, pl. 17), provides that one may receive a share

of the profits as interest on money loaned or as compensation for services, without becoming liable as partner. Hart v. Kelley, 83 Pa. St. 286. The broad rule of Waugh v. Carver had been modified prior to the statute. Irwin v. Bidwell, 72 Pa. St. 244; Edwards v. Tracy, 62 Pa. St. 381.

New Hampshire: Eastman v. Clark, 53 N. H. 276; s. c. 16 Am. Rep. 192 overthrows the old rule and follows Cox v. Hickman.

Connecticut: It is now held that the sharing of profits as profits is primâ facie proof that one is liable as partner, but that a share of the profits may be received as compensation for services, as rent, and in some other cases without creating a partnership even as regards third persons. Parker v. Canfield, 37 Conn. 250; Citizens' Bank v. Hine, 49 Conn. 236. But the idea that one who takes part of the profits diminishes the fund on which creditors rely, does not seem to be wholly abandoned. Citizens' Bank v. Hine, supra, p. 241.

Wisconsin: The rule of Waugh v. Carver has been adopted; Appleton v. Smith, 24 Wis. 331; Rosenfield v. Haight, 53 Wis. 260. But an exception in regard to receipt of profits as compensation for services is established; Nicholaus v. Thielges, 50 Wis. 491; Ford v. Smith, 27 Wis. 267.

Massachusetts: The rule is stated to be that a person who has not agreed to be a partner, nor held himself out as a partner, is yet liable as a partner to third persons, if by the agreement under which the business is carried on, he has an interest in a certain share of the profits as profits and a lien on the whole profits as security for his share; Pratt v. Langdon, 97 Mass. 97; 12 Allen 546; Holmes v. Old Colony R. R. Co., 5 Gray 58; La Mont v. Fullam, 133 Mass. 583; Pettee v. Appleton, 114 Id. 114; Dame v. Kempster, 15 N. E. Rep. 927. See also cases in other states where a somewhat similar rule has been adopted. Champien v. Bostwick, 18 Wend. 175; Reynolds v. Hick, 19 Ind. 113; Sankey v. Columbus Iron Works, 44 Ga. 228 [a case under the code]; Delaney v. Dutcher, 23 Minn. 373; Bradshaw v. Apperson, 36 Tex. 133; Rowland v. Long, 45 Md. 439; Campbell v. Dent, 54 Mo. 325; Bigelow v. Elliot, 1 Cliff. 28; Chapline v. Conant, 3 W. Va. 507. For criticism of this rule, see Story on Part., 7th ed., § 49 n. In Fitch v. Harrington, 13 Gray 468, there was an agreement by one partner with a third person that he should share a part of the profits of the firm,

and the court said, "An agreement between one co-partner and a third person, that he shall participate in the profits of the firm, as profits, renders him liable, as a partner, to the creditors of the firm, although as between himself and the members of the firm he is not their co-partner; but if such third person by his agreement with one member of the firm is to receive compensation for his labor, services, &c., in proportion to the profits of the business of the firm, without having any special lien on the profits, to the exclusion of other creditors, he is not liable for the debts of the firm." See Rockafellow v. Miller, 14 N. E. Rep. 433. Where several persons signed articles of association, intending to form a corporation, but the association failed to become a corporation because the requirements of the statute were not complied with, and certain persons carried on the business intended to be carried on by the corporation as agents of the proposed corporation, with knowledge of all the defendants, it was held that the defendants were not liable as partners, whether they had subscribed for stock of the proposed corporation or not, as "no such relation was contemplated by any of the parties"; Ward v. Brigham, 127 Mass. 24.

New Jersey: Wild v. Davenport, 48 N. J. L. 129, follows Cox v. Hickman.

Missouri: In Donnell v. Harshe, 67 Mo. 170, there was an agreement that one should occupy and cultivate a farm and that the crops should be divided equally between the occupant and the owner. It was held that no partnership was necessarily created, as something more than mere sharing of profits is essential to make a partnership. See also 68 Mo. 242. In Kellog Newspaper Co. v. Farrell, 88 Mo. 594, the court quoted from McDonald v. Matney, 82 Mo. 358e "That a mere participation in profits and loss does not necessarily constitute a partnership between the parties so participating. . . . It is a question of intention. . . . Each case must be determined upon its own peculiar facts." See also Clifton v. Howard, 89 Mo. 192. In Kelly v. Gaines, 24 Mo. App. 506, it was held that in order to create a partnership there must not only be a sharing of profits, but each person must have an interest in the profits as principal trader.

Michigan: The later Michigan cases follow Cox v. Hickman, and late English cases: Beecher v. Bush, 45 Mich. 188; Colwell v. Britton, 59 Mich. 350.

Georgia: The Code, § 1890, provides, "A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in the profits alone does not." See Dalton City v. Hawes, 37 Ga. 115; Camp v. Montgomery, 75 Ga. 795, and cases cited.

Present American rule. — Under the influence of the severe criticism made upon the rule laid down in Waugh v. Carver, and particularly since the case of Cox v. Hickman, 9 C. B. N. S. 47, 8 H. of L. C. 268, 30 L. J. C. P. 125, decided in 1860, the American cases have very largely abandoned the doctrine of Waugh v. Carver. The tendency of the courts in this country is to hold that one is not liable to third persons as a partner unless there is a partnership inter sese, except where one has held himself out as a partner, so that the doctrine of estoppel applies. In deciding whether there is a partnership inter sese the effect of the whole contract between the parties must be considered, and the relation the parties have assumed to each other must be determined by reference to all its parts. The fact that there is in the contract an agreement to share profits is strong, though not conclusive, evidence of partnership, and such an agreement will establish the partnership in the absence of other controlling evidence; Meehan v. Valentine, 29 Fed. Rep. 276; In re Francis, 2 Sawyer 286; s. c. 7 Bank. Reg. 359; Re Ward, 8 Rep. 136; Culley v. Edwards, 44 Ark. 423; Le Fevre v. Castagnio, 5 Col. 564; Vinson v. Beveridge, 3 Mac-Arthur (D. C.) 597; Smith v. Knight, 71 Ill. 148; s. c. 22 Am. Rep. 94; Williams v. Soutter, 7 Iowa 435; Chaffraix v. Laffite, 30 La. An., Part 1, 631; Beecher v. Bush, 45 Mich. 188; s. c. 40 Am. Rep. 465; Kellog Newspaper Co. v. Farrell, 88 Mo. 594; Colwell v. Britton, 59 Mich. 350; s. c. 26 N. W. Rep. 538; Parchen v. Anderson, 5 Montana, 438; Wild v. Davenport, 48 N. J. L. 129; Hart v. Kelley, 83 Pa. St. 286; Boston &c., Smelting Co. v. Smith, 13 R. I. 27; s. c. 43 Am. Rep. 3. In Re Randolph, 1 Ont. App. 315; Sankey v. Columbus Iron Works. 44 Ga. 228 (a case on construction of the code); Eastman v. Clark, 53 N. H. 276; Blair v. Shaeffer, 33 Fed. Rep. 218: Harvey v. Childs, 28 Ohio St. 319; Clifton v. Howard, 89 Mo. 192; Kelley v. Gaines, 24 Mo. App. 506; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; Wilcox v. Matthews, 44 Mich. 192; Holden v. French, 68 Me. 241; Fourth Nat'l. Bank

v. Altheimer, 91 Mo. 190. See also Darling v. Belhouse, 19 U. C. C. B. 268. While the fact that one is entitled to a share of the profits is not conclusive evidence of partnership, yet it has been held that one cannot be a partner unless he has a right to share in the profits; in other words, communion of profits is necessary to a partnership; Irvin v. N., C. & St. L. Ry. Co., 92 Ill. 103; Jones v. Howard, 53 Miss. 707.

Cases where sharing profits does not create partnership. — A sharing of profits does not make one a partner, even as regards third persons, in the following cases.

Share of profits as compensation for services. - A. Where a share in the profits is given as compensation for services; Buzard v. Greenville Nat'l. Bank, 67 Tex. 83; s.c. 2 S. W. Rep. 54; Mason v. Hacket, 4 Nev. 420; Marsh v. N. W. Nat'l Ins. Co., 3 Biss. 351; Donley r. Hall, 5 Bush (Ky.) 549; Holmes v. Old Colony R. R. Co., 5 Gray 58; Bigelow v. Elliot, 1 Cliff. 28; Vinson v. Beveridge, 3 MacArthur (D. C.) 597; Pierson v. Steinmyer, 4 Rich. L. 309, 319; Leggett v. Hyde, 58 N. Y. 272; Wheeler v. Farmer, 38 Cal. 203; Holden v. French, 68 Me. 241; Parker v. Fergus, 43 Ill. 437; Burton v. Goodspeed, 69 Ill. 237; Edwards v. Tracy, 62 Pa. St. 374; Muzzy v. Whitney, 10 Johns. 226; McArthur v. Ladd, 5 Ohio St. 514; Ellsworth v. Pomeroy, 26 Ind. 158; Morrison v. Cole, 30 Mich. 102; Dale v. Pierce, 85 Pa. St. 474; Holbrook v. Oberne, 56 Iowa 324; Le Fevre v. Castagnio, 5 Col. 564; Shepard v. Pratt, 16 Kan. 209; Commonwealth v. Bennett, 118 Mass. 443; Mauney v. Coit, 86 N. C. 463; Newman v. Bean, 21 N. H. 93; Loomis v. Marshall, 12 Conn. 69; Berthold v. Goldsmith, 24 How. 536; Missouri &c., R. Co. v. Johnson, 7 S. W. Rep. 838; Randle v. State, 49 Ala. 14; Morgan v. Stearns, 41 Vt. 398; Wilkinson v. Gett, 7 Leigh (Va.) 115; s. c. 30 Am. Dec. 493; Price v. Alexander, 2 G. Greene (Iowa); s. c. 52 Am. Dec. 526; Day v. Stevens, 88 N. C. 83; Chapman v. Liscomb, 18 S. C. 233. But some cases have held that if one was entitled to a share of the profits, though it was intended as compensation for services, yet he became of necessity, because of his sharing in the profits, liable as a partner; 1 A. K. Marshall (Ky.) 181; Taylor v. Terme, 3 Har. & J. 505. See also Rowland v. Long, 45 Md. 439; Strader v. White, 2 Neb. 348; Motley v. Jones, 3 Ired. Eq. 144; Purviance v. McClintee, 6 S. & R. 259; Ditsche ". Becker, 6 Phil. 176: Beckwith v. Talbot, 2 Col. 639. An

agreement that a person shall have a part of the profits as salary will not prevent his being held to be a partner if the whole agreement shows that a partnership was intended; Brigham v. Clark, 100 Mass. 430.

Share of profits as rent. — B. Where a share of the profits is given as rent or for the use of personal property; Bigelow v. Elliot, 1 Cliff. 28; Beecher v. Bush, 45 Mich. 188; s. c. 40 Am. Rep. 465; Holmes v. Old Colony R. R. Co., 5 Gray 58; McDonald v. Battle House Co., 67 Ala. 90; s. c. 42 Am. Rep. 99; Quackenbush v. Sawyer, 54 Cal. 439; Parker v. Fergus, 43 III. 437. See Smith v. Vanderburg, 46 Id. 34, where a portion of the profits was given as compensation for a secret and for stock on hand; Keiser v. State, 58 Ind. 379; Reed v. Murphy, 2 G. Greene (Iowa) 574; Thompson v. Snow, 4 Me. 264; s. c. 16 Am. Dec. 263, a case where a vessel was let. See, also, 57 Id. 543; Thayer v. Augustine, 55 Mich. 187; Perine v. Hankieson, 11 N. J. L. 181; Heimstreet v. Howland, 5 Den. 68, where a ferry was let for part of the profits; Johnson v. Miller, 16 Ohio 431; Irwin v. Bidwell, 72 Pa. St. 244, 251; Brown v. Jaquette, 94 Id. 113; s. c. 39 Am. Rep. 770; England v. England, 1 Baxter 108; Tobias v. Blin, 21 Vt. 544; Felton v. Deall, 22 Id. 170; Bowyer v. Anderson, 2 Leigh (Va.) 550; Chapline v. Conant, 3 W. Va. 507; Haydon v. Crawford, 3 U. C. Q. B. (old ser.) 583; Hawley v. Dixon, 7 U. C. Q. B. 218; Great Western Ry. Co. v. Breston & Berlin Ry., 17 Id. 477; La Mont v. Fullam, 133 Mass. 583. But see contra, Dalton City Co. v. Dalton Manf. Co., 33 Ga. 243; Holifield v. White, 52 Ga. 567; Adams v. Carter, 53 Id. 160.

Share of profits as interest.—C. Where a share of the profits is given as interest; Neihoff v. Dudley, 40 Ill. 406; Smith v. Vanderberg, 46 Id. 34; Lintner v. Milliken, 47 Ill. 178; Eshleman v. Harnish, 76 Pa. St. 97. [See Pa. Statute, supra.] But some cases following the earlier English decisions hold that one who takes a share of the profits as interest, thereby becomes liable as a partner to third persons. Sheridan v. Medara, 10 N. J. Eq. 469; Pierson v. Steinmyer, 4 Rich. L. 309; Wood v. Valette, 7 Ohio St. 172; Parker v. Canfield, 37 Conn. 250; McDonald v. Millandon, 5 La. 403; Rosenfield v. Haight, 53 Wis. 260. In Sheridan v. Medara and Pierson v. Steinmyer, supra, the partnership was held to be created when the contract was usurious. But it has been held that a partnership will not be inferred because

a contract for interest is usurious. Plunkett r. Dillon, 4 Del. Ch. 198; Richards r. Hughitt, 76 N. Y. 55; s. c. 32 Am. Rep. 267; Irwin r. Bidwell, 72 Pa. St. 244. An excessive share of the profits has, however, been held to create a partnership; Hargrave r. Conroy, 19 N. J. Eq. 281; Oppenheimer r. Clemmons, 18 Fed. Rep. 886; Brigham r. Dana, 29 Vt. 1, 9; Re Francis, 2 Sawy, 286; s. c. 7 Bank. Reg. 359; Parker r. Canfield, 37 Conn. 250; s. c. 9 Am. Rep. 317. In order that a share of the profits as interest should not create a partnership, there should be a bond fide loan which is to be repaid in any event; Harris r. Hillegass, 54 Cal. 463; Wood r. Valette, 7 Ohio St. 172; Brigham r. Dana, 29 Vt. 1, 9; Rosenfield r. Haight, 53 Wis. 260; s. c. 40 Am. Rep. 770. If the loan is a mere device to avoid the liability of partnership, then the parties will be held to be partners; In Re Francis, 2 Sawy, 286.

Share of profits from funds left in business.— D. Where legatees receive profits from funds left in a business, by order of testator, they do not become liable for the debts of the business; Jones v. Walker, 103 U.S. 444; Pitkin v. Pitkin, 7 Conn. 307; s. c. 18 Am. Dec. 111. See Heighe v. Littig, 63 Md. 391; Phillips v. Samuel, 76 Mo. 657.

But where, under partnership articles, in case of the death of one partner his children were to succeed to his interest until the expiration of the partnership contract, and they did so succeed, on their father's death, it was held that they became liable to creditors as partners; Nave v. Sturges, 5 Mo. App. 557.

Agreement that losses shall not be shared. — Where there is an agreement to share profits, the mere fact there is an agreement that a certain person is not to share losses does not relieve him from liability as a partner as to third persons if otherwise the contract shows him to be such; Pollard v. Stanton, 7 Ala. 761; Camp v. Montgomery, 75 Ga. 795; Consolidated Bk. v. State, 5 La. Ann. 44; Robbins v. Laswell, 27 Ill. 365; Rowland v. Long, 45 Md. 439; Bank of Rochester v. Monteath, 1 Den. 402; Walden v. Sherburne, 15 Johns. 409. See, also, Clift v. Barrow, 15 N. E. Rep. 327. Contra, Whitehill v. Shickle, 43 Mo. 537.

Holding out as partner. — As has already been intimated, one who has held himself out as a partner or allowed himself to be so held out is liable as a partner, though as a matter of fact he was not actually a partner; Smith v. Hill, 45 Vt. 90; Stim-

son v. Whitney, 130 Mass. 591; Dailey v. Coons, 64 Ind. 545; Carmichael v. Greer, 55 Ga. 116; Cothill v. Van Duzen, 22 Vt. 511; In re Jewett, 15 N. B. R. 126.

But "one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such knowledge or belief, cannot charge him with liability as a partner, if he was not a partner in fact"; Thompson v. First Nat'l Bk., 111 U. S. 529.

Effect of whole agreement considered. — If the whole agreement shows the parties to have assumed the relation of partners, there will be held to be a partnership though the parties did not intend to be partners, and even though they had provided that they were not to be so considered; Haas v. Root, 26 Hun 632; Rosenfield v. Haight, 53 Wis. 260; Cooley v. Broad, 29 La. An. 345.

But an agreement that there shall be no partnership has been held valid between the parties; Gill v. Kuhn, 6 S. & R. 333, 338; Jordan v. Wilkins, 3 Wash. C. Ct. 110. And also against third persons who had knowledge of the agreement; Hastings v. Hopkinson, 28 Vt. 108; Chapman v. Devereux, 32 Id. 616, 623. See, also, Baily v. Clark, 6 Pick. 372.

CUTTER r. POWELL.

TRINITY. - 35 GEO. 3.

[REPORTED 6 T. R. 320.]

If a sailor hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a quantum meruit.

To assumpsit for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster, the jury found a verdict for the plaintiff for 311. 10s., subject to the opinion of this court on the following case:—

The defendant being at Jamaica, subscribed and delivered to T. Cutter, the intestate, a note, whereof the following is a copy: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty, as second mate, in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship Governor Parry sailed from Kingston on the 2nd of August, 1793, and arrived in the port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2nd day of August, and proceeded, continued, and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is four pounds per month; but when seamen are shipped by the run from Jamaica to England, a gross sum is usually given.

The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by J. Haywood for the plaintiff, but the court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage (a) one way or the other; but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

Chambre for the plaintiff, and Wood for the defendant.

Arguments for the plaintiff. — The plaintiff is entitled to recover a proportionable part of the wages on a quantum meruit, for work and labour done by the intestate during that part of the voyage that he lived and served the defendant; as in the ordinary case of a contract of hiring for a year, if the servant die during the year, his representatives are entitled to a proportionable part of his wages. If any defence can be set up against the present claim, it must arise either from some known general rule of law respecting marine service, or from the particular terms of the contract between these parties. But there is no such rule applicable to marine service in general as will prevent the plaintiff's recovering, neither will it be found, on consideration, that there is anything in the terms of this contract to defeat the present claim. It is indeed a general rule that freight is the mother of wages (b); and therefore if the voyage be not performed, and the owners receive no freight, the sailors lose their wages; though that has some exceptions where the voyage is lost by the fault of the owners, as if the ship be seized for a debt of the owners, or on account of having contraband goods on board: in either of which cases the sailors are entitled to their wages, though the voyage be not performed. Vin. Abr. "Mariners," 235. But here the rule itself does not apply, the voyage having been performed, and the

⁽a) See the notes to Wigglesworth v. Dallison, ante, vol. i.

⁽b) See, on that subject, Appleby v. Dods. 3 East, 300: The Neptune, 1 Hagg. 227. [The right of a seaman to wages is now no longer dependent

on the earning of freight. See The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 183. The rule mentioned in the text never applied to the wages of the master. *Hawkins* v. *Twizell*, 5 E. & B. 883.]

owners having earned their freight. There is also another general rule, that if a sailor desert, he shall lose his wages (a); but that is founded upon public policy, and was introduced as a means of preserving the ship. But that rule cannot apply to this case; for there the sailor forfeits his wages by his own wrongful act, whereas here the seaman was prevented completing his contract by the act of God. So if a mariner be impressed, he does not forfeit his wages; for in Wiggins v. Ingleton (b), Lord Holt held, that a scaman, who was impressed before the ship returned to the port of delivery, might recover wages pro tanto. Neither is there anything in the terms of this contract to prevent the plaintiff's recovering on a quantum meruit. The note is a security, and not an agreement; it is in the form of a promissory note, and was given by the master of the ship to the intestate to secure the payment of a gross sum of money, on condition that the intestate should be able to, and should actually, perform a given duty. The condition was inserted to prevent the desertion of the intestate, and to ensure his good conduct during the voyage. And in cases of this kind, the contract is to be construed liberally. In Edwards v. Child (c), where the mariners had given bonds to the East India Company not to demand their wages unless the ship returned to the port of London, it was held that as the ship had sailed to India, and had there delivered her outward-bound cargo, the mariners were entitled to their wages on the outwardbound voyage, though the ship was taken on her return to England. This note cannot be construed literally, for then the intestate would not have been entitled to anything, though he had lived and continued on board during the whole voyage, if he had been disabled by sickness from performing his duty. But even if this is to be considered as a contract between the parties, and the words of it are to be construed strictly, still the plaintiff is entitled to recover on a quantum meruit, because that contract does not apply to this case. The note was given for a specific sum to be paid in a given event; but that event has not happened, and the action is not brought on the note. The parties provided for one particular case: but there was no express contract for the case that has happened; and therefore the plaintiff may resort to an undertaking which the law

⁽a) [See Edward v. Trevethick, 4

⁽b) 2 Lord Raym. 1211.

E. & B. 59.]

⁽c) 2 Vern. 727.

implies, on a quantum meruit for work and labour done by the intestate. For though, as the condition in the note which may be taken to be a condition precedent, was not complied with, the plaintiff cannot recover the sum which was to have been paid if the condition had been performed by the intestate, there is no reason why the representative of the seaman, who performed certain services for the defendant, should not recover something for the work and labor of the intestate, in a case to which the express contract does not apply.

Arguments on behalf of the defendant. - Nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was, that the law implies what they would have agreed to do had they entered into a precise treaty; but when once they have expressed what their agreement was, the law will not imply any agreement at all. In this case the intestate and the defendant reduced their agreement into writing, by the terms of which they must now be bound. This is an entire and indivisible contract; the defendant engaged to pay a certain sum of money, provided the intestate continued to perform his duty during the whole voyage; that proviso is a condition precedent to the intestate or his representative claiming the money from the defendant, and that condition not having been performed, the plaintiff cannot now recover anything. If the parties had entered into no agreement, and the intestate had chosen to trust to the wages that he would have earned and might have recovered on a quantum meruit, he would only have been entitled to eight pounds; instead of which, he expressly stipulated that he should receive thirty guineas, if he continued to perform his duty for the whole voyage. He preferred taking the chance of earning a large sum, in the event of his continuing on board during the whole voyage, to receiving a certain, but smaller rate of wages for the time he should actually serve on board; and having made that election, his representative must be bound by it. In the common case of service, if a servant who is hired for a year die in the middle of it, his executor may recover part of his wages in proportion to the time of service (a); but if the servant

⁽a) The old law was otherwise; Vid. Bro. Abr. "Apportionment," pl. 13; ib. "Labourers," pl. 48; ib.

[&]quot;Contract," pl. 31; and Worth v. . Viner, 3 Vin. Abr. 8 and 9.

agreed to receive a larger sum than the ordinary rate of wages, on the express condition of his serving the whole year, his executor would not be entitled to any part of such wages in the event of the servant dying before the expiration of the year. The title to marine wages by no means depends on the owners being entitled to freight; for if the sailors desert, or do not perform their duty, they are not entitled to wages though the owners earn the freight. Nor is it conclusive against the defendant that the intestate was prevented fulfilling his contract by the act of God; for the same reason would apply to the loss of a ship, which may equally happen by the act of God, and without any default in the sailors; and yet in that case the sailors lose their wages. But there are other cases that bear equally hard upon contracting parties, and in which an innocent person must suffer, if the terms of his contract require it; e.g., the tenant of a house who covenants to pay rent, and who is bound to continue paying the rent, though the house be burned down (a). (Lord Kenyon, Ch. J. But that must be taken with some qualification: for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, Lord C. Northington said that if the tenant would give up his lease, he should not be bound to pay the rent (b).) With regard to the case cited from 2 Lord Raym., the case of a mariner impressed is an excepted case, and the reason of that decision was founded on principles of public policy.

Lord Kenyon, C. J.—I should be extremely sorry that, in the decision of this case, we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided, should not be overturned. Whether these kind of notes are much in use among the seamen we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words

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⁽a) Vide Belfour v. Weston, ante. 1 T. R. 310.

⁽b) Vide Brown v. Quilter, Ambl. 619. This doctrine is, however, now

overruled. Hare v. Groves, 3 Anst. 687. Holtzapfel v. Baker, 18 Ves. 115. See Bullock v. Dommitt, 6 T. R.

of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are, that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves, and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on a quantum meruit for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas, provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say, that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

Ashurst, J.— We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued, however, that the plaintiff may now recover on a quantum meruit; but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it, and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was, by the terms of his contract, to perform a given duty, before he could call upon the defendant to pay him anything: it was a condition precedent without

performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still, as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

Grose, J. In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much relied upon. I have looked into the laws of Oleron; and I have seen a late case on this subject in the Court of Common Pleas, Chartler v. Greaves (a). I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favourable to the seaman; so much so, that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages, after deducting what has been laid out for him. In the case of Chandler v. Greaves, where the jury gave a verdict for the whole wages to the plaintiff, who was put on shore on account of a broken leg, the court refused to grant a new trial, though I do not know the precise grounds on which the court proceeded. However, in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage, instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything. I believe, however, that in point of fact, these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

Lawrence, J.—If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. In Salk. 65, there is a strong case to that effect; there, debt was brought upon a writing by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100%, per annum for his service; the plaintiff showed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded 75l. for three quarters: after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt, it could not be divided: and this court were of that opinion, and reversed the judgment. With regard to the common case of a hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the impressed man, perhaps it is an excepted case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owners of the ship. Postea to the defendant,

Unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term: but the case was not mentioned again. Frw questions are of so trequent occurrence or of so much practical importance, and at the same time so difficult to solve as these in which the dispute is, whother an action can be brought by one who has entered into a special contract part of which remains importantial.

We find it laid down in the treatises, that in certain cases the performance of, or readiness to perform, one side of the contract is a condition precedent to the right to demand performance of the other side. And rules are given in the text-books for the purpose of enabling us to distinguish these cases from another class in which we such condition which has been tractors are bound by mutual independent covenants or promises. (See the notes to Parliage v. Clab. 1 Wms. Saund, 448, and to Parliage v. Clab. 1 Wms. Saund, 448, and to Parliage v. Clab. 1 Wms. Saund, 448, and to Parliage v. Clab. 1 Wms. Saund, 448, and to Parliage v. Clab. 1 Wms. Saund, 442, Ed. 1871.)

We find it also labit down that no action of the Mutter resonant of aports a query to mercif can be brought for anything done under a special agreement which remains open: transfer v. Martin I live in the II live v. He out 2. 2. East, 145; but that, where the terms of the special agreement have been performed on one side, and nothing is to be done upon the other but a money payment, such payment may be enforced by an action of indehitatus assumpsit.

Control Mutter 1 B & P N & 1 B N P 1 + 1, 4600 & W & 1 & 1 Wils 117; Clutter a k v. C. S. & M. & G. 812 see B in the v. Nash, I M. & W. 515, and per Timoal, C. J. in transfer d v. B. & Blag N. C. 10 E. cited in North v. Product, I Q. B. 810, where if was held that the non-performance of a stepulation, not being a condition procedent to repayment, was no objection to an action of indehitatus assumpsit, for money lent.

We also find that there are some cases in which work has been done, or goods supplied, under a special agreement, but not in conformity thereto, and yet the payment of a compensation is enforced by action, because the defendant has retained and enjoyed the benefit of that which actually was done. Farusworth v. Garrard, I Camp. 38—Per Parke, J., in Rend v. Rom, 10 B. & C. 438.

And lastly, there are cases in which, even while the special contract remains open, one party has been permitted to put an end to it, and to sue for what has been already done under it upon a quarter a mernit—Buthers v. Remodels, 2 B. & Ad. 882; Plancké v. Colbarn, 8 Bing, 14; Prickett v. Bulger, 1 C. B. N. S. 296.

There is no difficulty in finding cases referable to each of the above classes, but the real difficulty is to determine when a case occurs in practice, to which of them it is referable. In the present note it will be attempted to deduce from the decisions a few rules, likely to prove useful in the resolution of such a difficulty.

The question it is proposed to discuss is as follows:—In what cases may an action be brought by a person who less entered into a special contract against the person with whom he has contracted, while the plaintiff's own side of the contract remains unperformed? Now [since there is a distinction in the nature of the actual rights of parties to contracts which was well defined by the now obsolete forms of action of special and indebitatus assumped, it is still convenient for purposes of analysis to subdivide the above question] into two branches:—

- 1. In what cases [might] the action [have been] brought into special assumpsit [or in other words] upon the contract itself?
 - 2. In what cases might it have been brought in indebitatus assumpsit?

[The meaning of this latter question will be considered *infra*.] The former of these questions it would be wrong to discuss here at much length, because it has been treated by Serjeant Williams in that clear and satisfactory style which distinguishes his writings, in the notes to *Pordage* v. *Cole*, 1 Wms. Saund. 548; and *Peeters* v. *Opie*, 2 Wms. Saund. 742. The result of the elaborate discussion contained in those notes is as follows:—

There are some special contracts in which the promises upon the one side are dependent on the promises upon the other side, so that no action can be maintained for non-performance of the former, without showing that the plaintiff has performed, or at least has been ready, if allowed, to perform, the latter, the performance of, or readiness to perform which is said to be acondition precedent to his right of action. Of this description was the case of Morton v. Lamb, 7 T. R. 125, cited 2 Wms. Saund. 552 b. where the declaration averred, that in consideration that the plaintiff had bought of the defendant 200 quarters of wheat at a certain price, the defendant undertook to deliver it at a certain place in one month from the sale; and that the plaintiff was always, for one month from the sale, ready and willing to receive the wheat, but that the defendant did not deliver it. After verdict, the judgment was arrested, on the ground that the declaration ought to have averred that the plaintiff was ready and willing to pay the stipulated price upon delivery; and the court said, that where two concurrent acts were to be done, the party who sues the other for non-performance must aver that he has performed, or was ready to perform his own part of the contract. In such cases as the one just cited, the matters to be done upon each side are said to be concurrent acts, because by right they ought to be done at the same time; and a readiness to perform his own side of the contract is a condition precedent to the right of either contractor to sue. Thus in agreements for the sale of real property, where one party agrees to convey, and the other to pay the price, the vendor cannot sue for the money without showing that he was ready to convey; nor the vendee for a refusal to convey, without showing a readiness to pay the money. See Glazebrook v. Woodrow, 8 T. R. 366; and see Head v. Baldrey, 6 A. & E. 459; Chanter v. Leese, 4 M. & W. 295. [S. C. in error, 5 M. & W. 698, and White v. Beeton, 7 H. & N. 42.]

There are other cases in which one contractor must show a readiness to perform his part before he can sue, but the other need not, as in the case cited in *Morton* v. *Lamb*, where a party was to pull down a wall and *then* to be paid for it: the pulling down was a condition precedent to the right to enforce payment; but a readiness to pay was not a condition precedent to the right to oblige the defendant to commence the work. See *Coombes* v. *Green*, 11 M. & W. 480.

Other cases there are in which neither of the contractors is subjected to any condition precedent to his right to enforce performance by the other of his part; but the promises on each side are independent of what is to be done upon the other. Such was the case of Campbell v. Jones, 6 T. R. 570; in which A. agreed, in consideration of a sum of money, to teach B. a particular method of bleaching for which he, A., had a patent, and to allow B. to exercise that method during the continuance of the patent right. It was held that A. might sue for the money, though he had not instructed B., who might on his side, if he pleased, sue for the neglect to instruct him. In these cases, the promises on the one side, not the performance of those promises, are the consideration for the promises upon the other side. In the former cases of concurrent acts and conditions precedent, the consideration is the performance,

not the promise. Hobert 106. See Frenkhas, Miller 4 A a F 500; Country entitle, 4 M a W 734. While v. State, 10 M a W 300. For a v. 100. S. 14 Q. B. D. 792; 54 L. J. Q. B. ..., and I hor v. I. ..., 2 A a L. 24, where the point arose on the construction of a private A 5 of Fredament. But although while the contract was excludery performance of a sufficient sulprinted might have been a condition procedent to the right of the party making it to sue upon the contract, yet if the other party has received a substantial portion of the consoleration, it is no longer competent for run to set up the non-performance, in answer to the action. Cortex S. Stroll, L. R. 10 Q. B. 564, unless indeed indirectly by way of constantial mater the Judicature A t. which would be tantamount to giving P in evisions in reliection of damages.

The question whether the acts stipulated for in a given contract are concurrent, or whether performance, or readiness to perform, upon either side be a condition precedent to the right to enforce performance on the other, is to be solved not by any technical rules, but by ascertaining, if possible, the intention of the parties. 1 T. R. 645. In order to discover that intention, the following rules are laid down by Serjaant Williams, I Wass Sains) 548, in notice

1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance: for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for the performance of that which is the consideration of the money or other act." See Mattock v. Kinglake, 10 A. & E. 50, and Wilks v. Smith, 10 M. & W. 360, where the agreement was to sell land for a sum to be paid at the expiration of four years, and interest in the meantime half-yearly. It was held that the declaration for an instalment of the interest need not contain an averment of readiness to convey. See also Alexander v. Gardner, I Bing, N. C. 671; Hall v. Bardard p., 5 Q. B. 230; Lord Howdon v. Simpson, 10 A. & E. 793; Pistor v. Cater, 9 M. & W. 315; Judson v. Bowlen, 1 Exch. 162; Jowett v. Spencer, 1 Exch. 647; Deleg v. J. L. Son. 6 C. B. 403; where the delivery of an abstract of title by the yendor to the yendee according to the terms of the conditions of sale was held not to be a condition precedent to the right of the vendor to sue for the purchase-money.

[But although "the day for the payment of money," ke., "may," according to the letter of the contract. "happen before the thing which is the consideration of the money or other set is to be performed," still if it can be gathered from the whole instrument that the intention of the parties was that the performance of a particular act should be a condition precedent to the right to be paid the money, performance must be averred and proved. See *Roberts* v. *Brett*, 18 C. B. 561; 6 C. B. N. S. 611; 11 H. L. 337, where the plaintiff contracted to procure a ship and to do certain things *forthwith*, the defendant contracting to pay 1000*l*, within seven days after the arrival of the ship at M. wharf. There was a stipulation that bonds for securing the performance of the contract should be given by each party within ten days from the execution of the indenture, and it was held that the giving the bond was a condition precedent to the plaintiff's right to be paid the 1000*l*, for although the seven days from the ship's arrival at M. wharf might expire before the ten days within which the bond was to be executed, it was clearly the intention

of the parties that the execution of the bonds should be a security to each side for the due performance of the contract, and as such was a condition precedent to the right of *either* party to sue upon it. "Forthwith" was construed to mean within a reasonable time, having regard to all that was to be done by both parties.]

2. "When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." See Glaholm v. Hays, 2 M. & G. 257; Matthews v. Taylor, 2 M. & G. 667; Lucas v. Godwin, 3 Bing. N. C. 737; Porcher v. Gardner, 8 C. B. 461; Staunton v. Wood, 16 Q. B. 638; Grafton v. Eastern Counties Rail. Co., 8 Exch. 699. In Neale v. Ratcliffe, 15 Q. B. 916, the defendants, who were tenants to the plaintiff of a house and other premises, agreed to keep in repair "the said messuage, buildings, and premises, the same being first put into good tenantable repair and condition" by the plaintiff. The action was brought for the non-repair, and the declaration alleged that the plaintiff had before breach put the premises in repair. At the trial the jury found that the plaintiff had only put part of the premises in repair, but that part had not been left in repair by the defendants. The court held that the repairing by the plaintiff was a condition precedent to the obligation to repair on the part of the defendants, [(see Coward v. Gregory, L. R. 2 C. P. 153)], and that on this contract the condition could not be divided, so that the plaintiff, not having repaired the whole, could not recover in respect of the non-repair of any part; as to the latter point, see Kingdon v. Cox, 5 C. B. 522 and Rolt v. Cozens, 18 C. B. N. S. 673]. See as to conditions precedent in [leases and in] farming and mining contracts, Cannock v. Jones, 3 Exch. 233 (affirmed in Cam. Scacc. 5 Exch. 713, and in Dom. Proc. 3 H. L. C. 700); Friar v. Grey, 15 Q. B. 891-901; 5 Exch. 584-597 [4 H. L. C. 565; and Clarke v. Westrope, 18 C. B. 765; Dean and Chapter of Bristol v. Jones, 1 E. & E. 484; Tidey v. Mollett, 16 C. B. N. S. 298; Bastin v. Bidwell, 18 Ch. D. 238; Williams v. Brisco, 22 Ch. D. 441; and Edge v. Boileau, 16 Q. B. D. 117; 55 L. J. Q. B. 90]; in contracts for the sale of real property, Dicker v. Jackson, 6 C. B. 103; Manby v. Cremonini, 6 Exch. 808 [of personalty, Woolfe v. Horne, 2 Q. B. D. 355; Bowes v. Shand, 2 App. Cas. 455]; in charter-parties, Ollive v. Booker, 1 Exch. 416; Oliver v. Fielden, 4 Exch. 135; Rae v. Hackett, 12 M. & W. 724; [Thompson v. Gillespy, 5 E. & B. 209; Hudson v. Bilton, 6 E. & B. 565; Tarrabochia v. Hickie, 1 H. & N. 183; Behn v. Burness, 1 B. & S. 877, S. C. in error 3 B. & S. 751; Pust v. Dowie, 5 B. & S. 20, 33; Andrew v. Chapple, 1 C. P. 643; Corkling v. Massey, L. R. 8 C. P. 395; Jackson v. Union Marine Insurance Co., L. R. 10 C. P. 125; Tully v. Howling, 2 Q. B. D. 182; Inman Steamship Co. v. Bischoff, 7 App. Cas. 670; 52 L. J. Q. B. 169; in bills of lading, Duthie v. Hilton, L. R. 4 C. P. 138; in building contracts, Morgan v. Birnie, 9 Bing. 672; Lamprell v. Billericay Union, 3 Exch. 283; Roberts v. Bury Improvement Commissioners, L. R. 5 C. P. 310; Jones v. St. John's College, L. R. 6 Q. B. 115; in a guarantee policy, London Guarantee Co. v. Fearnley, 5 App. Cas. 911.]

3. "When a covenant or promise goes only to part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise. And an action may be maintained for the breach of it by the defendant without averring performance, or readiness, in the declaration." Such was the case of Stavers v. Curling, 3 Bing. N. C. 355, which is a very strong example, for in that case the defendant's promises were expressed in the contract to be performable "on the performance" of the

plaintiff's, and were yet held to have been intended to be and to be independent. See also Franklin v. Miller, 4 A. & In 500 William North 10 M. & W 355; Globolm V. Huss 2 M & G 257, and Some V Preser, 1 Q B 809, where it was decided that in the case of a loan stipulated to be repaid with an agreement that securities deposited should be returned appa repayment the return of the securities was neither a concurrent act nor a condition precedent. See further, Galagers v. Jackson, 3 M & G 960 Fisher gast to v. Robertson, 5 M & G 131; Mackint sh v. Milliand Rullway Co., 14 M & W. 548; Christia V. Borelly, 7 (B N S 561; Sugar V Datha, 8 (B N S 45; Newson v. Smothies, 28 L. J. Ex. 97; Neill v. Whitworth, L. R. I.C. P. 684; Eston v. Key L. R. 6 Ch. 610; Sympson v. Crygen, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28; Roper v. Johnson, L. R. S.C. P. 167; Bettern v. Gpc. I. Q. B. D. 183, 45 L. J. Q. B. 209, where a breach by the plaintiff, an opera singer, of a stipulation to be in London for rehearsals six days before the commencement of his engagement, was held no bar to his sunng the detendant on the latter's refusal to engage him; but compare Poets and v. Spress, I. Q. B. D. 410, 45 L. J Q. B 621, where the plaintiff's inability to appear at the earlier of certain stipulated performances was held to go to the root of the contract.]

4. "When the mutual promises or covenants 20 to the whole consideration on both sides, they are mutual conditions, and performance must be averred." See Atkinson v. Smith. 14 M. & W. 625.

5. "When two acts are to be done at the same time, as when A. covenants to convey an estate to B. on such a day and in consideration thereof, B. covenants to pay A a sum of money on the same day, neither can maintain an action without averring a performance, or an offer to perform, his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sale." See Stephens v. De Medical, 4 Q. B. 422, recognised by the Court of Common Pleas in Brackley v. Bell, 3 C. B. 284, and Marsden v. Moore, 4 H. & N. 590; see also Bankart v. Beavers, L. R. 1 C. P. 484; Paynter v. James, L. R. 2 C. P. 348. To this it may be added, that there is a large class of cases in which, though no condition be expressed, the lapse of a reasonable time is an implied condition ought to be averred as well as where it is expressed. Stanart v. Eastwood, 11 M. & W. 197; Sanson v. Rhodes, 6 Bing, N. C. 261; Granger v. Invers, 12 M. & W. 431, and per Maule, J., Startup v. Macdonald, 2 M. & G. 395.

The authorities on which these rules depend will be found cited and discussed in the notes by Serjeant Williams above referred to, I Wms. Saund. 548; and 2 Wms. Saund. 742, ed. 1871. It is proper to add, that when it [was] laid down that performance of a concurrent act must be averred, the meaning of that [was], that the plaintiff must [have averred] in his declaration that he was ready and willing to perform his part of the contract; see Hannuic v. Goldner, 11 M. & W. 849, and Granger v. Dacre, 12 M. & W. 431. where the plaintiff, having declared on an agreement to accept goods within a reasonable time after notice, the declaration was held bad, for not averring that he was himself during such reasonable time ready to deliver them. See also Jackson v. Allaway, 6 M. & G. 942; Boyd v. Lett, 1 C. B. 222; Giles v. Giles, 9 Q. B. 164; Armitage v. Insole, 14 Q. B. 728; [Duthie v. Hilton, L. R. 4 C. P. 138.] And the averment of the plaintiff's readiness and willingness to perform his part of the contract will be proved by showing that he called on the defendant to accomplish his. Wilks v. Atkinson, 1 Marsh. 412; Levy v. Lord Herbert, 7 Taunt. 314; 1 B. M. 56, by Dallas, L. C. J.: Pickford v. Grand Junction Railway Co., 8 M. & W. 372.

It [was] not, however, necessary in any case to aver the performance of conditions precedent when the declaration show[ed] that the defendant ha[d] absolutely incapacitated himself from performing his part of the contract, Lovelock v. Franklyn, 8 Q. B. 371; Bradley v. Benjamin, 46 L. J. Q. B. [590;] and see, as to averring the dispensation, or waiver of conditions precedent, Ripley v. M'Clure, 4 Exch. 345; Doogood v. Rose, 9 C. B. 131; [Cort v. Ambergate Rail. Co., 17 Q. B. 127; Hochster v. De La Tour, 2 E. & B. 678.]

By sect. 57 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the averment of the performance of conditions precedent might be made generally, and the opposite party was not allowed to deny such averment generally, but was bound to specify in his pleading the condition or conditions precedent, the performance of which he intended to contest. [See Bentley v. Dawes, 9 Exch. 666, and Wood v. The Copper Miners' Co., 17 C. B. 561.

Under the system of pleading established by the Judicature Acts, no averment of the performance of conditions precedent is necessary, but an averment of their performance is to be implied in the pleading of the party for whose case they are necessary: and the opposite party is to specify directly in his pleading any condition precedent the performance of which is intended to be contested. See O. 19, r. 14.]

The next branch of the question proposed at the beginning of this note is — In what cases would an action of *indebitatus assumpsit* [or as it was usually called, after the omission in the declaration of any averment of a promise, an action upon the *common counts*] have lain, while the special contract remained open? This is a question of great practical importance. And as the distinctions it involves are more than usually fine, and the authorities numerous, an attempt will be made to classify them, and deduce from them one or two general rules.

[The meaning of this question really is, "When may it be said that although the plaintiff has not performed his part of the contract, there is nevertheless, in contemplation of law, a debt due from the defendant to the plaintiff, in respect of what the plaintiff has done under the contract?" When this debt arose out of a new contract inferred from the conduct of the parties, as, for instance, where the benefit of something done under, but not in accordance with the contract had been accepted, it became properly recoverable under what were called the common courts, and therefore, though the late compendious system of pleading has been abolished, the question to be determined in each case is still the same, and must be tested by the same rules.

On the other hand, when the party suing has not departed from the terms of the special contract at all, but has been ready and willing to do all that it was the intention of the parties he should do, his action is properly said to be brought upon the special contract itself. In ascertaining what was the intention of the parties, which must be gathered from the instrument itself, nice questions must necessarily arise as to what are or are not conditions precedent to the right of either party to sue, but these questions do not depend on mere subtleties of pleading, they are questions of fact which must be answered at some stage in the investigation before a decision as to whether a right of action exists can be arrived at.

It is submitted, therefore, that the pleading test which has been adopted as the basis of the present note, resting as it does upon a logical analysis of the cause of action in each case, is not only the simplest and most exact that can be applied, but must still, under a looser system of pleading, be as practically

useful as it has been heretofore. It is none the less important to ascertain exactly what a plaintiff's rights are, although those rights may no longer be lost through inexactness of statement on the part of the pleader at the outset of the case.

In the first place, then, there is a numerous class of cases which establish the general proposition that while a special contract remained open is a unperformed, the party whose part of it was unperformed could not sue in indebitatus assumpsit to recover a compensation for what he had done, until the whole was completed. This principle is affirmed and acted on in Cotter v. Powell; it was also the ground of the decision in Hulle v. Heightman, 2 East, 145; a decision of considerable celebrity, and which is said in the judgment to have proceeded on the authority of Weston v. Downes, Dougl. 23; but Weston v. Darmes belongs to a somewhat different class of cases the action was there brought to recover back the price of a horse in consequence of a breach of warranty; so that it was not an attempt to obtain compensation for work done, or goods delivered, under a special contract; but to recover money paid on a consideration which was alleged to have failed, and this the plaintiff, having accepted the horse, was not allowed to do. Weston v. Downes therefore belongs to the same class with Short v. Blay, 2 B. & Ad. 456, which is now the leading case on that subject, and differs from Hulle v. Heightman, where the action was not for money had and received to recover back cash paid on a consideration which had failed, but for work and labour done under a special contract which had been only in part performed. In that case the plaintiff, who was a seaman, sued for wages. He proved a service on board the defendant's ship, from Altona to London. He further proved that, on arriving at London, the defendant refused to give the seamen victuals, and bade them go on shore, saying he could get plenty of their countrymen to go back for their victuals only. The plaintiff accordingly did go on shore, - that after some days the defendant required him to return on board, which he refused to do, saying he had the law of him. He then commenced his action. The defendant put in the articles of agreement under which the plaintiff served, which showed that he was hired from Altona to London and back again, and contained a special clause by which the plaintiff bound himself to demand no wages till the conclusion of the voyage. Upon these facts, Le Blanc, J., nonsuited the plaintiff, on the ground that the special contract remained open and war s incled, and that the plaintiff should have sued on it, and not in indebitatus assumpsit; and the Court of King's Bench afterwards approved of that ruling.

The principle on which Hulle v. Heightman was decided has never since been questioned. Assuming the special contract to have remained open and unrescinded, the plaintiff was undoubtedly bound to sue on it, and not in indebitatus assumpsit. But whether the court was right in assuming that the special contract did, after what had taken place, remain open and unrescinded, is a very different question, and upon that question it is submitted that the argument of Mr. Gibbs was correct, when he contended that the special contract has been put an end to, and that the plaintiff had a right to treat it as having never existed, and to sue for his labour on a quantum mernit. And it is further submitted that it is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has, thereupon, a right to elect to rescind it, and may, on doing so, immediately

sue on a quantum meruit for anything which he had done under it previously to the rescission: this it is apprehended is established by Withers v. Reynolds, 2 B. & Ad. 882; Planché v. Colburn, 8 Bing. 14; Franklin v. Miller, 4 A. & E. 599; [Prickett v. Badger, 1 C. B. N. S. 296; Inchbald v. The Western Neilgherry Coffee Co., 17 C. B. N. S. 733], and other cases which will be presently cited and commented upon. Now in Hulle v. Heightman, the defendant had refused to perform his part of the contract, and the plaintiff had, by bringing his action on a quantum meruit, elected to rescind. It is submitted, therefore, that the case of Hulle v. Heightman, so far as it assumes that the special contract remained open, would not now be supported, unless, indeed, it can be so upon the following consideration; viz. it may be urged, that the question whether the acts of the defendant, Heightman, amounted to an absolute unqualified refusal to perform his part of the contract, was a question which ought to have been left to the jury, and that as the plaintiff's counsel did not require that it should be submitted to them, he must be taken to have acquiesced in the opinion of Mr. J. Le Blanc, that the circumstances did not amount to a rescission.

On the same principle with Hulle v. Heightman proceeded Ellis v. Hamlin, 3 Taunt. 52; R. v. Whittlebury, 6 T. R. 464; Spain v. Arnot, 2 Stark. 256; Turner v. Robinson, 6 C. & P. 15; Ridgway v. Hungerford Market Co., 3 A. & E. 171 (which latter were cases of servants discharged for cause, before the expiration of their year); Jesse v. Roy, 1 C. M. & R. 316; and Sinclair v. Bowles, 9 B. & C. 92, which is, perhaps, more often cited than any other case upon this subject. It was an action of assumpsit for work and labour and materials, and for goods sold. At the trial it appeared that the plaintiff had repaired three chandeliers for the defendant, and that 51. was a reasonable price for the work and materials; but it was also proved by the defendant that the plaintiff, when he accepted the job, expressly agreed to make them complete for the 101., which he had failed in doing. The learned judge, Parke, J., nonsuited the plaintiff, giving him leave to move to enter a verdict for 5l.; but the court refused the rule, on the ground that the contract was entire, and that the plaintiff not having completed his part, had no right to recover anything.

The effect of this case was discussed in the later one of Roberts v. Havelock, 3 B. & Ad. 404. That was an action for work and materials; the plaintiff, a shipwright, had engaged to put a ship of the defendant into thorough repair. Before this had been completed, the plaintiff demanded payment for what he had already done, and refused to finish the job without. The defendant refused payment, and thereupon this action was brought; and a verdict having been found for the plaintiff, the defendant moved to set it aside, on the ground that the special contract was still open. The court refused a motion made, in pursuance of leave, to enter a nonsuit. "I have no doubt," said Lord Tenterden, "that the plaintiff was entitled to recover. In Sinclair v. Bowles, the contract was to do a specific work for a specific sum. There is nothing in this case amounting to a contract to do the whole repairs and make no demand till they are completed."

From these words it may be thought that his lordship's judgment proceeded on the ground that the performance of the whole work is not to be considered a condition precedent to the payment of any part of the price, excepting when the sum to be paid and the work to be done are both specified, (unless, of course, in case of special terms in the agreement expressly imposing such condition); and certainly good reasons may be alleged in

favour of such a doctrine, for when the price to be puld is a specified sum as in Southile's Reaches. It is clear that the court and page in have no right to apportion that which the parties themselves have treated as entire and to say that it shall be paid in instalments contrary to the agreement instructor in a round sum as provided by the agreement, but where no price is specified, this difficulty does not arise, and perhaps the true and right presamption is, that the parties intended the payment to keep pace with the account of the benefit for which payment is to be made.

But this, of course, can only be where the consideration is itself of an apportionable unions for it is east to put a case in which though no price has been specified, yet the consideration is of so indivisible a nature, that it would be absurd to say that one put should be paid for before the remainder; as where a painter agrees to draw A is likeness it would be absurd to require A, to pay a rateable sum on account when half the face only had been far-ished: it is obvious that he has then received no benefit, and never will receive any unless the likeness should be perfected. There are, however, cases (that, for instance of fariests x Hings) in which the consideration is in its nature apportionable and there, if no entire sum laive been agreed on as the price of the entire benefit it would not be unjust to presume that the intention of the contractors was that the renumeration should keep pute with the consideration, and be recoverable totics quoties by action on a quantum mercal.

This position besides what is said by Lord Tenterdon is perhaps somewhat countenanced by Withers v. Reynolds, 2 B. & Ad. 882. That was assumpsit for not delivering straw according to the following agreement "John Reynolds undertakes to supply Joseph Withers with wheat straw delivered at his premises till the 24th June, 1830, at the sum of 3.5s per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight; and the said J. W. agrees to pay J. R. 33s. per load for each load so delivered from this day to the 24th June, 1870, according to the terms of this agreement." It appeared that the plaintiff had refused to pay for the straw open deilerry, and it was contended that he was not bound to do so, and that as no time was named for the payment, he might defer it till the expiration of the contract, or that, at all events, the promises to deliver the straw and to pay for it were independent, and should be enforced by cross actions. But the court held that he had a right to be paid totics quoties on the delivery of each load, and that the plaintiff's refusal to do so gave him a right to rescind the contract, and that the plaintiff was therefore properly nonsuited. Such are the arguments in favour of the doctrine at which Lord Tenterden seems to have hinted in Roberts v. Havelock. At the same time, it must not be concealed that the expressions of Parke, J., in that very case, lean the other way. "If," says his lordship, "there had been any specific contract by the plaintiff for completing the work, the argument of the defendant might have had much weight, . But this was only a general employment of the plaintiff by the defendant, in the same way as all shipwrights are employed." Yet surely if the plaintiff had refused to complete on payment as he went along, an action would have lain against him. In Withers v. Reynolds, Taunton, J., expressly founds the decision upon the special wording of the contract. "for each load." &c., which he says imports that each load shall be paid for on delivery; and, indeed, if that case were decided on any other ground, it would be contrary to the opinion expressed by Parke, J., in Oxendale v. Wetherall, 9 B. & C. 386; [and see Button v. Thompson, L. R. 4 C. P. 330.]

To return from this digression. In Read v. Rann, 10 B. & C. 438, recognised in Broad v. Thomas, 7 Bing. 99, the doctrine of Cutter v. Powell, Hulle v. Heightman, and Sinclair v. Bowles, was again acted upon. In that case a ship-broker brought an action for commission for procuring a charterer for cases, if the bargain was perfected, the commission was five per cent., but if the bargain went off, nothing was payable; and here it had gone off. The plaintiff was nonsuited. "The claim of the plaintiff," said Parke, J., "rests on the custom, and not on a quantum meruit. The custom presupposes a special contract, and, if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases, a special contract not executed may give rise to a claim in the nature of a quantum meruit, ex. gr. where a special contract has been made for goods sent not according to the contract have been retained by the party, there a claim for the value on a quantum valebant may be supported. But then from the circumstances a new contract may be implied."

But no claim in the nature of a quantum meruit can be founded upon a special contract which has not been performed unless the person who has a right to insist on the performance of the special contract has accepted some benefit resulting from its partial performance, or the circumstances are such as to show, in some other way, that a new contract has arisen between the parties. For instance, if A. agree with B. to pay him a sum of money if he will sell for him an advowson, and the original bargain be that the money is to be paid on the sale, and there is nothing in the contract from which it can be implied that B. is to be paid for abortive attempts to sell, and nothing has occurred to show that a new contract has arisen, B. cannot, if the sale does not take place, claim remuneration under a quantum maruit for the work actually done in the attempt to sell; although if the sale have been prevented by a revocation of B.'s authority, and that revocation be wrongful, an action will lie against A. for his wrongful act. See Simpson v. Lamb, 17 C. B. 603. And if the bargain goes off through the default of the principal, the agent who has performed his part of the contract is entitled to his whole commission, Green v. Lucas, 33 L. T. 584. As to when an agent's authority may be revoked, and the consequences which result from the revocation, Smart v. Sandars, 3 C. B. 380, 5 C. B. 895; Taplin v. Florence, 10 C. B. 744; and the judgments in Campanari v. Woodburn, 15 C. B. 400.

Nor, as is obvious, will any action lie on a quantum meruit where services have been rendered in anticipation of a special contract, which is, after all, not entered into, there being no intention that such services shall be paid for. Harrison v. James, 7 H. & N. 894, was a case of this class: a verbal agreement had been made that the defendant's son should go on trial to the plaintiff's house, and if the parties were satisfied should be afterwards apprenticed to the plaintiff. The son remained some time with the plaintiff on trial, and was boarded and lodged by him, but the intended apprenticeship went off, and the son left the plaintiff's house. Upon these facts it was held that the plaintiff could not recover for the board and lodging during the period when the son had been in his house; for it was clear, under the circumstances, that the parties never meant that the board, &c., was to be paid for.]

The general rule being thus established, viz. that while the special contract remained unperformed, no action of indebitatus assumpsit could be brought for anything done under it, we now come to the exceptions from that rule; and the first of them is that adverted to by Mr. J. Parke, in the passage just

ented. It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case the party cannot recover the remuneration stipulated for in the contract because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his lateral, if would be unjust to allow him to retain that without paying anything. The law therefore implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth, and to recover that quantum of remuneration, an action of policities assumpted was inclusionable. This is conceived to be a just expression of the rule of law, [which still] prevails. The cases on the subject are, however, extremely numerous, and in many instances at variance with each other; and, as the subject is one of great general importance, it will perhaps be best, and fairest to the reason to enter somewhat more at large upon it, even at the risk of prolixity.

The rule which was in early times observed upon this subject, was diametrically opposite to that which now obtains. It was held that whenever anything was done under a special contract, but not in conformity thereto, the party for whom it is done must pay the stipulated price, and resort to a cross action to indemnify himself for the defleiency in the consideration. Thus It was held, in Rome v Danie 1794 offed 7 Past 479, in man, that the plaintiff, who had agreed to build a race booth for twenty gulness was entitled to recover the whole price, although the booth was so badly constructed that it fell down during the races, and it was admitted that a cross action would lie against the plaintiff. In Templar v. M'Lachlan, Feb. 6, 1806, 2 N. R. 136, an action was brought on an attorney's bill, and the defence was gross negligence in the plaintiff, who had allowed improper bail to justify. The evidence of negligence was held hadmissible, and the planstiff recovered the whole amount of his bill; the court saying that the only case in which such evidence would be admissible was where the negligence was so great that the plaintiff had derived no benefit at all, and that there they would perhaps admit it, to prevent circuity. In Mills v. Bainbridge, cited 2 N. R. 136, injury from improper stowage was held to be no defence in an action for freight.

However, in Trinity Term, 46 G 3 (June 13, 1806), the rule which now obtains was established by the decision of the K. B. in Basten v. Butter, 7 East, 479. That was an action of assumpsit for work and labour, and materials, brought by a carpenter, whom the defendant, a farmer, had employed to roof a linhay and a barn. The defendant, at Nisi Prius, offered to prove that the work had been done in a grossly impreper manner. This evidence was rejected on the authority of Browne v. Davis, and a verdict found for the plaintiff, which the court set aside on the ground that the defence ought to have been admitted.

This decision was followed by Farnsworth v. Garrard, I Camp. 38, which was also an action of $assum_tsit$ for work and labour, and materials, brought by the plaintiff, who had rebuilt the front of a house for the defendant. The defence was that the house was so out of the perpendicular that it was in danger of falling. Parke, for the plaintiff, objected, that this was only ground for a cross action; and he relied on Templar v. M'Lachlan. Lord Ellenborough admitted the evidence. "This action," said his lordship, "is founded on a claim for meritorious service: the plaintiff is to recover what he deserves. It is, therefore, to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There

was formerly considerable doubt upon this point. The late Mr. J. Buller thought—and I, in deference to so great an authority, have, at times, ruled the same way—that, in cases of this kind, a cross action for the negligence was necessary; but that, if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject, and I now consider this as a correct rule: that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand. The claim shall be co-extensive with the benefit."

This case was followed by *Denew* v. *Daverell*, 3 Camp. 451, where the same rule was applied in an action by an auctioneer against his employer. See too *Bracey* v. *Carter*, 12 A. & E. 373; *Nicholls* v., *Wilson*, 11 M. & W. 107; *Hill* v. *Featherstonhaugh*, 7 Bing. 569; *Shaw* v. *Arden*, 9 Bing. 287; *Gill* v. *Lougher*, 1 Tyrwh. 121; *Huntley* v. *Bulwer*, 6 Bing. N. C. 111: [Cox v. Leech, 1 C. B. N. S. 617; and *Long* v. *Orsi*, 18 C. B. 610, where this rule was applied in actions brought by attorneys to recover against their clients the costs of abortive proceedings at law.] And *Poulton* v. *Lattimore*, 9 B. & C. 259, and *Street* v, *Blay*, 2 B. & Ad. 456, established, beyond all doubt, that, even where there was an express warranty, and a breach of that warranty was the defect of consideration complained of, the defendant might, in an action for goods sold and delivered, give evidence of the breach of warranty in reduction of damages. (*Vide Dicken* v. *Neale*, 1 M. & W. 556.) And this might have been done under the general issue, *Hill* v. *Allen*, 2 M. & W. 283. [As to the further extension of this principle by the Judicature Act 1873, see *infra*.]

In Francis v. Baker, 10 A. & E. 642, it was attempted to stretch this principle so far as to include a case in which a broker, who had purchased railway shares for the defendant, sued for money paid, and the latter set up as his defence conversion of the shares by the broker: the court, however, held that that was matter for a cross action. It will be observed that the distinction between that case and the others, is that the defence there was not the inferiority of the article procured by the broker, or the badness of his work, but a subsequent independent tort. However, in Mondel v. Steele, 8 M. & W. 871, the court said that there were exceptions to the practice of allowing the defence of the inferiority of the thing done to that contracted for, to be applied in reduction of damages: and they intimated, that in actions for an attorney's bill, or for freight, the defence would not be allowed, unless it went to the extent of denying that any benefit at all had been derived. See, however, the distinction taken in Hill v. Featherstonhaugh, between a useless item severable from the rest of the account, and one inseparable.

[In a modern case (Dakin v. Oxley, 15 C. B. N. S. 646) an attempt was made to push very far, and to apply to a totally distinct class of cases, the rule laid down by Lord Ellenborough in Farnsworth v. Garrard, that "where there has been no beneficial service there shall be no pay." In Dakin v. Oxley, a shipowner sued a charterer for the freight of coals, and the latter pleaded that owing to the negligence and unskilfulness of the master and mariners in the navigation and management of the ship, the coals were so damaged on the voyage that on their arrival at the port of discharge they were of less value than the freight, and were abandoned to the shipowner. This plea admitted, as will be observed, that the goods arrived as coals, and were of some value. The Court of Common Pleas refused, in a judgment which exhausted the subject, to uphold this defence, and laid down distinctly that by the law of England "where goods have arrived, though damaged, the

freight is payable by the ordinary terms of the charter-party, and the question of fortuitons damage must be settled with the underwriters, and that of culpable damage, in a distinct proceeding for such damage against the ship captain, or owners; "see also Robinson v. Kpophts, L. R. s.C. P. 465, M_{VI} -chant Shapping Co. v. Areatups, L. R. 9. Q. B. 99. In a similar case, there might now be a counterclaim under the Judicature Acts for the damage, see infrat, p. 34.

Independently of the Judicature Act, it is settled by Street v. Blay, and Poulton v. Lattimore, that, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all: the power to pursue this first course, however, not extending to cases where there has been a warranty upon the sale of a specific chattel, and where, the property passing by the contract, it is not competent to the vendee to rescind it without the consent of the vendor, or a stipulation to that effect. See the observations of the judges in the case of Darson v. Callis, 10 C. B 523; also Passes v. S. ton, 4 C. B. 899. 2. He may receive it, and bring a cross action for the breach of the warranty; or, 3. He may, without bringing a cross action, use the breach of warranty in reduction of the numiges in an action brought by the vendor for the price; i.e., to the extent of the difference between the agreed price or alleged value, and the real value at the time of delivery as reduced by the breach of contract; but if there be any further damage, besides that so allowed in abatement of the price, he must bring a cross action. Mondel v. Steele, 8 M. & W. 858, and see Rappe v. Berhame, 15 M. & W. 598

It was once thought, and indeed laid down by Lord Eldon in Curtis v. Hannay, 3 Esp. 82, that the vendee might, on discovering the breath of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to Weston v. Downes, ante, p. 20, is, however, overruled by Street v. Blug, and tempert, v. D aton, 1 C. & M. 207; 3 Tyrwh, 232; and it is clear that, though the noncompliance with the warranty may , where the property has not passed justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price [Foster v. Smith, 18 C. B. 156]; unless, indeed he return it, having kept it as he has a right to do, see Lorrymer v. Smith, 1 B. & C. D such a time only as was necessary for a fair examination, in which case he cannot be considered as having received it at all. See Okell v. Smith, 1 Stark, 107; Jordan v. Nortan, 4 M. & W. 155; Street v. Blay, Young v. Cole, 3 Bing. N. C. 730; where a distinction was drawn between the effect of a breach of warranty, and of a total failure of consideration. See also Gompertz v. Bartlett, 2 E. & B. 849, and Gurney v. Womersley, 4 E. & B. 133. And probably the distinction between a condition and a warranty, as pointed out by Mr. Justice Vaughan Williams in Dawson v. Collis, 10 C. B. 530, will be found to obviate any difficulty that may be supposed to exist, in deciding what are the cases in which a vendee can refuse to accept, or can return the article, and either resist payment of the price, or recover it back if paid.

A warranty properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities: but the property passing by the contract of sale, [Dixon v. Yates, 5 B. & Ad. 313; Gilmour v. Supple, 11 Moo. P. C. C. 551.] a breach of the warranty cannot entitle the vendee to rescind the contract, and revest the property in the vendor, without his con-

sent; the vendee must therefore resort to an action for such breach, or give it in evidence in reduction of the price, or as an answer to the action if the breach renders the article wholly worthless.

But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a [mere] warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. See [Nichol v. Godts, 10 Exch. 191; Josling v. Kingsford, 13 C. B. N. S. 447; Heyworth v. Hutchinson, L. R. 2 Q. B. 447] the observations of Mr. Justice Vaughan Williams in Dawson v. Collis, 10 C. B. 530, [and of Lord Blackburn in Bowes v. Shand, 2 App. Cas. 455,] the judgment of Lord Abinger in Chanter v. Hopkins, 4 M. & W. 399; [the judgment in Barr v. Gibson, 3 M. & W. 390, Gompertz v. Bartlett, 2 E. & B. 849, Lucy v. Mouflet, 5 H. & N. 229, and the judgment of the Exchequer Chamber in Behn v. Burness, 3 B. & S. 756, and of Blackburn, J., in Kennedy v. Panama, &c., Mail Co., L. R. 2 Q. B. 587.

But although the general rule is as above stated, it is open to the parties, if so minded, to contract when selling specific goods, that a particular stipulation, such, for instance, as one relating to the nature or condition of the goods, shall be conditional to the validity of the sale; and if this is the contract really intended, the buyer may repudiate the contract and return the goods, even after their delivery, on its appearing that the affirmation in question is not correct. In this class of cases the sale is not absolute, with a warranty or condition superadded, but conditional, and to be null if the affirmation is incorrect. Bannerman v. White, 10 C. B. N. S. 844, was a case of this class. There, on a sale of hops by sample, a preliminary affirmation was made by the seller that no sulphur had been used in the treatment of them. This undertaking, without which the buyers would not, as the seller knew, have gone on with the treaty which resulted in the sale, was honestly given, but in fact incorrect. The court held on the facts that the contract was not a mere sale with a warranty superadded, and that the buyers might repudiate the contract even after the delivery of the hops. See also the judgment already referred to of the Exchequer Chamber in Behn v. Burness, 3 B. & S. 755, 756; and as to what stipulations are to be deemed conditions on the sale of specific goods; Gattorno v. Adams, 12 C. B. N. S. 560; and see the notes to Chandelor v. Lopus, ante, vol. 1.7

But although Street v. Blay, and Poulton v. Lattimore clearly established that where there was a breach of warranty, that might be given in evidence in reduction, in an action of indebitatus assumpsit for the price, or a cross action might be brought upon the warranty, yet it is the opinion of a writer of great merit and learning (Mr. Starkie) that "where there is a specific bargain as to price, but no warranty, and goods inferior in value to those contracted for have been delivered, the vendee must, where it is practicable to do so without prejudice, return the goods, and thus rescind the contract in toto; and if he does not, must be taken to have acquiesced in the performance of the contract." Stark. Ev. vol. 2, p. 879, 2nd edit. [The learning upon this branch of law has however been rendered obsolete by the provisions of the Judicature Act, 1873, infra, and the discussion of Mr. Starke's opinion, which followed in former editions, has been therefore omitted.]

It has been said in some cases that the defendant of he mean to contend that the benefit received was not that which he stipulated for most give the plaintiff notice of his intention. However, the observation made on this subject by Lord Lilenborough, in Boston V. Butter seems conclusive via that if the plaintiff sue upon a grantin moral t, the very form of his own declaration gives him notice that the adequacy of the consideration may be disputed.

With respect to quantum of reduction, it is said by Parke, J., in Phornton v. Place, 1 M. & Rob. 219, that it Where a party engages to no certain specified work on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed on in the specification. Nor can be recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed on in the specification, subject to a deduction; and the measure of that deduction is the sum it would take to alter the work so as to make it correspond with the specification." As there, perhaps, might be cases to which this rule could not be with perfect justice applied, it probably was only laid down by the learned judge with reference to such as that numericately before him.

In Chappel v. Hicks, 2 C. & M. 214, Bayley, B., says, "The rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied." Lord Ellenborough's rule, laid down after consulting the judges in Firesworth v. terrord, was, "The claim shall be co-extensive with the benefit."

In the American courts, the rule on this subject seems to be the same as that recognised in the courts here before the Judicature Act, namely, that where a plaintiff declares upon a general count for work done, goods sold, or the like, under a special contract, the defendant may give in evidence everything that affects directly the value of the subject of the claim, as between the parties, including a breach of warranty, in reduction of damages. [He was not, however, by our law bound to do so, and if in an action against him on the special contract he had paid into court the sum claimed, he was not thereby estopped from bringing his cross-action for defective performance. Davis v. Hedges, L. R. 6 Q. B. 687

In the state of New York the rule is extended further, under the name of recoupment (as it is there called), or diminution of damages, in virtue of which a defendant in any action upon a special contract, even under seal, can, by giving notice, set up by way of recoupment any breach of the said contract by the plaintiff, so as to reduce the damages thereby. The defence, however, cannot be pleaded in bar of the action. See the notes to the 4th American edition of "Smith's Leading Cases," p. 45, by Messrs, Hare & Wallace; and for cases of diminution of damages by way of recouper in our courts, see lealey v. treew, 6 N. & M. 469, [a].

And now by Order XIX. r. 3 of the Rules of the Supreme Court, it is provided that "a defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a crossaction, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

And by Order XXI. r. 17, "where in any action a set-off or counter-claim

is established as a defence against the plaintiff's claim, the court may, if the balance is in favor of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

Before leaving the first exception to the general rule, that while the special contract remained open an action of indebitatus assumpsit would not lie, it may be well to notice a large class of decisions forming only an apparent exception; that is to say, cases in which the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance. Thus, if a shipowner contract to carry goods from A. to B. at a certain freight, and does not perform this contract, but the goods' owner voluntarily accepts the goods at a point short of the original destination, in such a manner as to raise an inference that the further carriage is dispensed with, a new contract will be implied to pay a compensation in the nature of freight, for that portion of the voyage which has actually been performed. Mullov v. Backer, 5 East, 316; the judgment in Hunter v. Prinsep, 10 East, 378; Luke v. Lyde, 2 Burr. 883; Christy v. Row, 1 Taunt. 300; Mitchell v. Darthez, 2 Bing. N. C. 555; Vlierboom v. Chapman, 31 M. & W. 230; Blasco v. Fletcher, 14 C. B. N. S. 14; The Soblomsten, L. R. 1 A. & E. 293. So where the master was justified by the imminence of war in refusing to proceed to the original destination, he was not held bound to deliver the goods at an intermediate port without receiving compensation for the carriage. The Teutonia, L. R. 2 A. & E. 395, 4 C. P. 171, and see Cargo ex Argos, L. R. 5 P. C. 134. In these cases, as is obvious, the freight pro rata itineris becomes due, not under the charter-party, but by a new contract inferred from the conduct of the parties.

But where a portion of a cargo was justifiably sold at a port short of the destination in order to raise funds to repair sea damage to ship, although the part sold fetched a higher price than it would have done at the port of destination, and the price realised was allowed to the charterer on a general average statement, and was received by him from the shipowner, it was held that the latter was not entitled to recover pro ratâ freight on the part which had been sold. Hopper v. Burness, 1 C. P. D. 137; and see Metcalfe v. Britannia Ironworks Co., 1 Q. B. D. 613, affirmed 2 Q. B. D. 423.

It must further be observed that where a special contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited by it liable to pay for this advantage; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Thus, in a modern case, the plaintiff having undertaken to complete certain work for a specified price on houses belonging to the defendant, the whole to be completed by a particular day, and to the satisfaction of a surveyor who was named, failed to complete the work according to the terms of the contract, but did work upon the houses. The defendant afterwards resumed the possession of the houses, and was therefore, at the time of the trial, to some extent enjoying the fruit of the labours of the plaintiff. It was held notwithstanding that the plaintiff could not recover either on the special contract, or for work and labour. For the special contract had not been performed, and the mere fact that the defendant had taken possession of his own houses, upon which work had been done, did not afford an inference

that he had discensed with the conditions of the special agreement of that he had contracted to pay for the work actually done according to near speand value. $Mware \times Butt_1 \otimes 1 - \infty \otimes 1.58$

The next exception to the g-neral rule, that no action of its oblitates assume sit will be while the special contract remains unperformed, is to be found in a class of cases which establish the proposition that when one party has absolutely refused to perform, or has incapacitated almost from performing his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a quantum mernit. That he may rescind it upon an absolute refusal by the other party to perform his part, is proved by Withers y Remarks, the facts of who heave been already stated. There, the plaintiff having refused to pay for the loads on delivery pursuant to his contract, the defendant was held entitled to rescind it.—If the plaintiff said Patteson, J. "back merely failed to pay for any particular lead that, of itself, might not have been an excuse to the defendant for delivering no more straw" [see Jonascohn v. Young, 4 B. & S. 296]; "but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant is therefore not liable for ceasing to perform his part of the contract."

This case was commented on in Freedita y. Miller, 4 A. & E. 1999, and the same doctrine laid down. "The rule is," said Coleridge, J., "that in rescinding, as in making a contract, both parties must concur." In Withers v. Reynolds, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for his loads on delivery, that was a total failure, and the defendant was no longer bound to deliver. In such a case it may be taken, that the party refusing has abandoned the contract. [And see Expansis Charles v. L. R. & Ch. 289; Margar v. Bright. R. 10 C. P. 15; La religible to the D. 180.

The refusal which is to authorise the rescission of the contract, must be an unqualified one. See the judgment of the court in Ehrensperger v. Anderson, 3 Exch. 15s and it must be acted on as a breach by the person who has a right to insist on the performance of the contract. The Danube, &c., Railway Co. v. Xenos, 11 C. B. N. S. 152; 13 C. B. N. S. 825 . In Lens v. Rees. tried before Mr. J. Coleridge, at the Monmouthshire Summer Assizes, 1837, the action was assumpsit, on a contract to build a house for a specified sum, with a count for work and labour, and materials. It appeared that the house was not yet completed, but that a good deal of extra work had been done by the defendant's order; that the plaintiff had called on him to pay for all that had been done, and that he had replied "that he would not - perhaps never." On this evidence the plaintiff's counsel submitted that he was entitled to recover on a quantum mernit for the extra work, and also to treat the special contract as rescinded. Coloridge, J., admitted that this would have been so. had the refusal to pay been absolute and unqualified; but thought that, in this case, the refusal to pay must be construed with reference to the demand, which was made, so far as the work done under the contract was concerned. too soon. He therefore held the plaintiff entitled to recover only for the extras. This note of Lines v. Rees, has been kindly perused, and its accuracy confirmed, by the defendant's counsel, Mr. Greaves.

[As to an absolute refusal to perform the contract and a rescission on that ground, see also Cort v. Ambergate Railway Co., 17 Q. B. 127; Reid v. Hoskins, 4 E. & B. 979; Avery v. Bowden, 5 E. & B. 714; 6 E. & B. 953, S. C.; Burtholomew v. Markwick, 15 C. B. N. S. 710; Leeson v. N. B. Oil, &c., Co., Ir. R. 8 C. L. 309.

In Avery v. Bowden, the defendant had agreed by charter-party to load a cargo on board the plaintiff's ship at Odessa, certain running days to be allowed. The declaration contained a count for not loading, which alleged that before the expiration of the running days, the defendant had dispensed with the ship's remaining at Odessa. To this count the defendant pleaded that before the cause of action arose war had been declared between England and Russia, and that the contract had thus been rescinded.

The facts appear to be that after the arrival of the ship at the port of loading, and before the declaration of war, the agent of the charterer had repeatedly told the master that he had no cargo for the ship, and that he, the master, had better go away; but the master had continued to require a cargo until the declaration of war was known at Odessa, which was before the expiration of the ship's laying days. It also appeared that in a conversation between the plaintiff and the defendant in England, after the declaration of war, the defendant had told the plaintiff that he had determined not to load the ship, but to rely on the chapter of accidents, and that he had telegraphed to his agent at the port of loading not to purchase a cargo.

Upon these facts it was held by the Court of Queen's Bench, that, assuming that the agent of the charterer had on his part renounced the contract before the declaration of war, this renunciation, not having been accepted by the master, did not either constitute a dispensation or give a cause of action. Lord Campbell, C. J., in delivering the judgment of the court in favour of the defendant, said, "According to our decision in Hochster v. De la Tour, 2 E. & B. 678, to which we adhere, if the defendant, within the running days. and before the declaration of war, had positively informed the captain that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract, and thereupon sailing away from Odessa, he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but if it had been much stronger, we conceive that it could not be considered as constituting a cause of action, after the captain still continued to insist upon having a cargo in fulfilment of the charter-party."

This judgment was affirmed in the Exchequer Chamber, where the judges stated that in their opinion there was no evidence of a dispensation. See also Barrick v. Buba, 2 C. B. N. S. 563, in which case a charter-party had been made between an English and Russian subject for the loading by the latter of a cargo at a Russian port: and it was held that an intimation made to the master at the port of loading by the agent of the charterer that he had ceded the charter-party with all its rights and obligations to a third party, and that he must address himself to that person for a cargo, was not such a renunciation of the charter as entitled the ship-owner to sue for a breach at that time; this intimation having been given before the time for loading had expired.]

Where a party has incapacitated himself from performing his side of the contract, the same consequence follows as if he had absolutely refused to do so. Robson and Sharpe v. Drummond, 2 B. & Ad. 303, was an action by Sharpe and Robson, who were coach-makers, against the defendant, for not

paying for a chariet which he had hired of Sharpe for five years, at seventy-five guineas per amone: Sharpe was to point and keep it in report. The defendant had contracted with Sharpe alone. When three years out of the five were expired, their person, having dissolved partnership with Robson, transferred the ste kin tracis and among other things, the chariet in question, to him. Robson offered to continue the contract with the detendant who refused to have anything to say to him, but offered to complete his engagement with Sharpe. Sharpe, however, stated that that was now impossible. Under these circumstances, the court held that the defendant had a right to rescind the contract, and decline to keep the chariot the remaining two years. "The fact," said Parke, J., "of Sharpe's having transferred his interest in the contract to Robson, was equivalent to saying, "I will not perform my part of the contract;" and this is an answer to the present action."

On the same principle was decided Planch's various as Blug 14, the facts of which will be presently stated: see likewise Planck v. I. apr., 2.A. & E. 50s; Amer v. F. area, 2.A. & E. 51s; and Key, v. Herre of, 2.C. B. 205. In this case the plaintiff had agreed to board and lodge the defendant and his son, and in payment for such board and lodging, to take certain furniture deposited upon his premises. After the agreement, and before the action, a creditor of the defendant obtained a judgment against him, and took the furniture in execution. The court held that the case was the same in effect as if the defendant had himself taken away the goods, and that the plaintiff was entitled to recover the value of the board and lodging upon the common count as if the special contract had never existed. See also the observations in the latter part of the judgment in Sunds v. Ohnel. S.C. B. 762.

But where a certificate by the defendant's surveyor of the due execution of work was made by the contract a condition precedent to the payment of the price, it was held that the fraudulent collusion of the defendant with the surveyor to withhold such certificate did not entitle the plaintiff to treat the contract as at an end and suc upon an *indebitatus* count for the price. Milner v. Field, 5 Exch. 829; and it was said the only remedy was a crossaction.

On a question of this sort depends the continuance of a contract after the death of one of the parties thereto; if it was one involving personal confidence, the death of the party confided in, rendering its performance impossible, puts an end to it; otherwise not. See Wentworth v. Cock, 10 A. & E. 42; 1so likewise in contracts for personal services, the death of either party puts an end to them unless it be otherwise agreed. Farrow v. Wilson, L. R. 4 C. P. 744

It must, however, be observed, that, in a case of this sort, the breach of contract which entitles the other contractor to rescind, must consist in the non-performance of something essential. "If the plaintiff," said Patteson, J., in Withers v. Reynolds, "had merely failed to pay for any particular load, that in itself might not have been an excuse to the defendant for delivering no more straw." Accord. Fillieul v. Armstrong, 7 A. E. 557; Freeman v. Taylor, 8 Bing. 124; Franklin v. Miller, 4 A. & E. 599; Ehrensperger v. Anderson, 3 Exch. 158; Corcoran v. Proser, Ex. Ch. Ir. 22 W. R. 222; [Freeth v. Burr, L. R. 9 C. P. 208; 43 L. J. C. P. 91.] Nor must it be a breach occasioned by his own wrongful refusal to accept performance. See Fitt v. Cassanet. 4 M. & Gr. 898.

[In Houre v. Rennie, 5 H. & N. 19, the contract was for the delivery of 667

tons of iron to be shipped from Sweden, in the months of June, July, August, and September, in about equal proportions each month, at a certain price, delivered in London.

In an action by the vendors for a refusal to accept or pay for the iron, a plea justifying the refusal on the ground that the plaintiffs had shipped in June a much smaller quantity than that which was required under the contract, and were never ready and willing to deliver such smaller quantity until after the defendants had had notice that the plaintiffs were unable to fulfil their agreement as to the June shipment, was upheld by the Court of Exchequer. This case, though questioned in *Jonassohn* v. *Young*, 4 B. & S. 296, was cited with approbation in *Bradford* v. *Williams*, L. R. 7 Exch. 259.

In Simpson v. Crippin, L. R. 8 Q. B. 14, however, a precisely similar point was raised in the Court of Queen's Bench, and an opposite decision was arrived at.

In that case the defendants had agreed to supply from 6,000 to 8,000 tons of coal, to be delivered into the plaintiff's wagons at the defendant's collieries, in equal monthly quantities during the period of twelve months from the 1st July. During the month of July the plaintiffs took from the defendants only 158 tons, and on the 1st August the defendants gave notice to the plaintiffs, that in consequence of the plaintiffs having taken so small a quantity, they cancelled the contract. In an action for refusing to deliver the residue, it was held that the breach by the plaintiffs in taking a smaller quantity did not justify the defendants in rescinding the contract, and Blackburn, J., said, "If the principle upon which that case," i.e., Hoare v. Rennie, "was decided is that wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases."

In Roper v. Johnson, L. L. 8 C. P. 167; 42 L. J. C. P. 65, in which a similar point arose, the decision in Simpson v. Crippin was treated as conclusive.

Since the last edition of this work, the case of *Hoare* v. *Rennie* has been much discussed in *Honck* v. *Muller*, 7 Q. B. D. 92; 50 L. J. Q. B. 529; and *Mersey Steel & Iron Co.* v. *Naylor*, 9 Q. B. D. 648; 9 App. Cas. 434; 53 L. J. Q. B. 497.

In Honck v. Muller the defendant sold to the plaintiff 2,000 tons of pig iron, at 42s. a ton, to be delivered to the plaintiff F. O. B. at maker's wharf. at Middlesborough, "in November, 1879, or equally over November, December, and January next, at 6d. per ton extra." The plaintiff failed to take any iron in November, and claimed to have one-third delivered in December, and one-third in January, which the defendant refused, and gave notice that he cancelled the contract. The majority of the court held that on the true construction of the contract the plaintiff was bound to elect and give notice to the defendant of his option in time to allow the latter to deliver the whole or part in November, and that the plaintiff had not so declared his option, and consequently could not maintain the action. Assuming, however, as the plaintiff contended, that the defendant had become bound to deliver the iron in three equal instalments, Bramwell and Baggallay, L.JJ., were of opinion that the plaintiff having broken the contract by not taking the November instalment, could not insist upon the defendant delivering the residue. That to hold that he could, would be to enable the plaintiff against the will of the defendant to substitute a contract to take 1,3331 tons for one to take 2,000. They treated Hoare v. Rennie as well decided; and Bramwell, L. J., distinguished Simpson v. Crippin, on the ground that the breach there was not with

respect to the first instalment, and that the contrast having been part 4er formed, could not be wholly undone. Brett 1. J. dissented trem this 1002 ment, and was of opinion that it was immaterial whether the breach was in respect of the first, or of a later delivery, and that $Str_{ij} = 2 \times C t/\eta \sin$ was inconsistent with $Hour = v \cdot Reach$, which latter case he thought was wroughy decided, and he held that in the case before them the plaintiff was entitled to succeed.

In the Mersey Steel & Iron Co. v. Varday the defendants had agreed to purchase from the plaintiffs 5,000 tons of steel blooms, to be activered on board at Liverpool by instalments of 1,000 tons monthly, commencing with January, 1881, payment to be made within three days after receipt of shipping documents. After the plaintiffs had delivered a portion of the first instalment, a petition was presented to wind up the plaintiff company, and the defendants acting upon the erroneous advice of their solicitor, refused to make the payments due in respect of the quantity delivered, in the mistaken view that pending the petition there was no one who could give them a valid discharge for the amount due. An order to wind up the plaintiff company having been made, and a liquidator appointed, the latter refused to make any further deliveries, on the ground that the defendants' refusal to pay for the quantity delivered, gave him the right to renounce the contract and brought the action to recover the price of the iron delivered. The defendants counterclaimed damages for the plaintiffs' fallure to deliver. Lord Coleridge, C. J., held that the liquidators' contention was well founded, and that the conduct of the defendants had absolved the plaintiffs from further performance of the contract, and precluded the defendants from insisting upon it. His decision was, however, reversed by the Court of Appeal, and the reversal was affirmed in the House of Lords, Lord Bramwell being a party to the decision. The latter learned lord repudiated the dictum attributed to him in Honck v. Muller, "That in no case where the contract had been part performed, could one party rely on the refusal of the other to go on," pointing out that every case must depend upon its special circumstances. Both in the Court of Appeal and the House of Lords the rule of law governing cases of this class, as laid down by Lord Coleridge in Free'h v. Burr, was referred to with approval. His lordship there says, after reviewing the authorities, "There has been some conflict amongst them, but I think it may be taken that the fair result of them is, as I have stated, namely, that the true onestion is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." Applying this principle to the case before them, their lordships had no difficulty in deciding that the conduct of the defendants in withholding payment for a particular delivery, under the erroneous advice of their solicitor, did not evince such an intention. Lord Bramwell, in pointing out that in Honek v. Muiler the conduct of the plaintiff clearly did evince such an intention, reiterated his approval of Houre v. Rennie, which he treated as decided upon the same principle.

In the last edition of this work Houre v. Rennie was treated as being opposed to the weight of authority. The explanation, however, of the diversity of opinion as to that case is probably that given by Bowen, L. J., in the Mersey Steel Co. v. Naylor, at p. 671 of 9 Q. B. D., namely, "that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct, or the reverse."

The importance attached by some members of the court in Honek v. Muller

to a breach with reference to the first, as distinguished from a later instalment, may, it is submitted, be explained by similar considerations, when it is remembered that the question in all these cases is one of fact. The distinction between a first and second instalment, though immaterial in point of law, may be very material in point of fact, since a failure or refusal to perform the first act under the contract will probably in most cases be much more cogent evidence of an intention not to be bound by the contract, than a subsequent failure by a person who has already by part performance evinced an intention of holding to his bargain.

The mere insolvency or bankruptcy of either party does not of itself operate as a rescission of the contract. See Ex parte Chalmers, L. R. 8 Ch. 289; Morgan v. Bain, L. R. 10 C. P. 15; Re Phænix Bessemer Co., 4 Ch. D. 108; Ex parte Stapleton, 10 Ch. D. 586. See as to a subsequent disclaimer by the trustee, In re Sneezum, 3 Ch. D. 463.

It being therefore established, that where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind, such act or such refusal being equivalent to a consent to the rescission, the remaining part of the proposition above stated is, that upon such rescission he has a right, if he have done anything under the contract, to sue *immediately* for compensation on a *quantum meruit*. That he should do so is consistent with reason and justice, for it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it.

He cannot, however, recover on the special contract, and must, therefore, be entitled to sue upon a quantum meruit, founded on a promise implied by law, on the part of the defendant, to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may, of course, bring his action immediately. This point is decided by Planché v. Colburn and Another, 8 Bing. 14. The declaration in that case stated that the defendants had engaged the plaintiff for 100l. to write a treatise on Costume and Ancient Armor, to be published in "The Juvenile Library;" that the plaintiff had written part, and was willing to complete and deliver the whole for insertion in that publication; but that the defendant would not publish it there, nor pay the sum of 100l. There was also the common count for work and labour.

At the trial it appeared that the plaintiff had been engaged on the terms above stated, that he had completed part of his work, that he had made a journey in order to inspect a collection of ancient armor, and made drawings therefrom; but that he had never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," on the ill success of some of the first numbers of the work.

The jury having found a verdict for the plaintiff with 50l. damages, the court was moved for a new trial. It was contended, that the plaintiff could not recover on the special contract, since he had not tendered or delivered his work, and that he could not recover on the *indebitatus* count for work and labour, because the special contract was still open. The court, however, refused the new trial, holding that, as the defendants had, by putting an end to "The Juvenile Library," incapacitated themselves from performing their engagement with the plaintiff to publish his work there, they must be taken

to have abandoned the contract altegether, and that he intall second for what he had done upon a quarter can be

The fact was, said the late L. C. J. Other like it for an arrivery suspended, but actually performed to. The Juverale Librar. They had broken their contract with the plaintiff and an attempt was to be built in the answersesfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book, as a secret some. I agree that when a special contract is in existence and open, the plaintiff cannot sue on a quantum meruit; part of the question, therefore, here was, whether the contract did exist or not. It distinctly appeared, that the work was finally abandoned, and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labour, and there is no ground for the application that has been made."

It would seem that the same at by one of the parties to a contract which gave the other party who had partly performed it a right to rescind it, and sue in indebitatus assumpsit for what he might have done under it, will, in case of an executory contract where nothing has been done under it, amount to a breach of the contract so as to furnish a ground of action. See Short v. Stone, s.Q. B. 555. i. It is a first that so, s.Q. B. 555. i. It is a first that so, s.Q. B. 555. i. It is a first that so, s.Q. B. 555. i. It is a first that such that such right of action might be enforced even before the day appointed by the contract for its performance by either party.

In that case the declaration stated that in consideration the plaintiff would agree with the defendant to enter his service on the 1st of June, 1852, as a courier, and travel with him as such courier for three months from the said 1st of June, at the rate of 10l, per month, the defendant undertook to receive him into his employ on the said 1st of June upon those terms. The declaration then averred that, from the time of the agreement until the time when the defendant wrongfully refused to perform his promise and exonerated the plaintiff from performance, he, the plaintiff, was always ready and willing to perform the agreement. Breach—that the defendant before the said 1st of June, 1852, refused to engage the plaintiff or performance of the agreement, to the damage of the plaintiff. The writ was duted on the 22nd of Mon, 1852.

It was contended, in arrest of judgment, that although a refusal by the defendant to perform the contract, if continued up to the time fixed for its performance, would give the plaintiff a right of action, yet the refusal was revocable up to such time, and the plaintiff could not sue until its expiration. The court, however, decided that the plaintiff was not bound to wait until after the first of June to bring his action, and that the declaration was good. But see the judgment of Parke, B., in *Philipats v. Ecans.* 5 M. & W. 475. Perhaps the cases are reconcilable by supposing that the judgment in *Hochs*-

ster v. De la Tour applies to cases in which, in consequence of the refusal, something has taken place to interfere with the performing the contract when the time arrives.

[It is impossible, however, even on this ground, to reconcile the judgment of Parke, B., just referred to, in all respects, with the more modern decisions; and in *The Danube*, &c., Railway Co. v. Xenos, 11 C. B. N. S. 152, 13 C. B. N. S. 825, which has been already cited, it was held, in accordance with these decisions, that where a contract is for the performance of a thing on a given day, and the person who is to perform it declares before the day that he will not perform it, then the other party has the option of at once treating this declaration as a breach of the contract. Accord. Frost v. Knight, L. R. 7 Ex. 111. In that case the defendant had promised to marry the plaintiff so soon as his (defendant's) father should die. During his father's lifetime he absolutely refused to marry the plaintiff, and it was held in the Exchequer Chamber, overruling the decision of the Court of Exchequer, that for this breach an action was well brought during the father's lifetime. And see Wilkinson v. Verity, L. R. 6 C. P. 206.

In Johnstone v. Milling, 16 Q. B. D. 460; 55 L. J. Q. B. 162, an attempt was made to apply the doctrine of Hochster v. De la Tour, and Frost v. Knight, to the case of a lease with several covenants. There the defendant had become tenant to the plaintiff for a term of 21 years, determinable at the end of the first four years by six months' notice. There was a covenant by the plaintiff to rebuild the premises at the expiration of the first four years on receipt of a six months' notice from the lessee requiring him to do so. Before the expiration of the four years the plaintiff had on more than one occasion told the defendant that he would be unable to procure the money for rebuilding, and in consequence of such statements the latter gave the six months' notice required by the contract to determine the tenancy at the end of the first four years. He, however, continued to occupy, paying rent to the plaintiff's mortgagees, on the chance of the plaintiff being able to find the money to rebuild. In an action brought by the plaintiff against the defendant for an independent claim, the above facts were proved in support of a counter-claim for damages founded on the repudiation by the plaintiff of his liability under the covenant before the time for performing it had arrived. The Divisional Court held that though the lease was determined before the time had arrived for performance the defendant was entitled to treat the plaintiff's declaration of inability to procure the money as an anticipatory breach within the principle of the above cases, justifying the defendant in rescinding the contract and suing for damages, and they gave judgment for the defendant. This judgment was, however, reversed in the Court of Appeal. That court held, that the facts proved did not establish a repudiation by the lessor of his obligation under the covenant, but, assuming that they did, they held that the effect of an anticipatory breach amounting to a repudiation is to give the other party a right to rescind the contract, keeping it alive only for the purposes of bringing an action upon it, or to hold to the contract and await the time for performance. But that such repudiation beforehand is not a breach at all, unless the other party elect to treat it as one, and that he cannot continue to reap the benefit of the contract and at the same time claim to treat it as rescinded. They held in the case before them that the lessee had not so elected, but had continued to cling to the contract, giving the requisite notice under it to determine the tenancy. The court seemed to be of opinion also, though they did not actually decide the point, that a declaration

beforehand of imbility to perform one elevenant in a lense which, if broken when the time for performance arrived, would not have catalled the losses to throw up the lease. Supplie v. Furnsworth, 7 M. = 6.57% could not justify the lessee in rescinding the contract within the principle of the cases referred to.]

There is a class of cases which appear at first sight a certly similar to Planché v. Colbarn, and Robson v. Dremon and, ante, p. 28, but which will be found, on closer inspection, to be distinguished by a peculiarity which it may be useful here to remark. I allude to those cases in which a servant, who has engaged to serve for a certain time at certain wages, is turned away by his master before the period for which he had engaged to serve has expired. In such a case it is clear that, if his dismissal be in consequence of his own misconduct, he will be entitled to no wages, for his faithful service is a condition precedent to his right to them, and that condition he has not performed, Furnit v. R. Sinson, C.C. & P. 15: 5 B. & Ad. 789; Callo v. Bronnek r. 4 C. & P. 548; Soria v. Agrov. 2 Stark 256; Amer v. Fedron, 9. A. & E. 518; Turner v. Mason, 14 M. & W. 116; Libby v. Limin, 11 Q. B. 742; Junless indeed the terms of the agreement be such as to show that the intention of the parties was that the right to wages should be divisible. See Button v. Thompson, L. R. 4 C. P. 330. In that case the plaintiff had been shipped as mate on board defendant's vessel, on a voyage from Shields to Alexandria and home, "voyage not expected to exceed twelve months, amount of wages per calendar month, 51. 10s." He had been drunken and insubordinate during the voyage out, and being on shore at Sulina was left behind, and the ship came home without him. In an action for wages for the time during which he had actually served on board, it was held, Brett, J., dissenting, that he was entitled to recover, though possibly not until the whole period of service stipulated for had expired.]

But, if the dismissal be unjust, the master cannot by his wrongful discharge prevent the servant from recovering due compensation. Such a case seems to range itself under the rule we have been just discussing. The master has absolutely refused to perform his contract with the servant, and it is apprehended that the servant has thereupon a right to rescind it, and to sue upon a quantum mernit for what he has already done under it. See the judgment in Lilley v. Elvin, 11 Q. B. 742.

But though he may rescind the contract, he is not, it has been said, obliged to do so. He has a right, it has been said, to consider it still in existence, to treat the wrongful dismissal as no dismissal at all, and to demand, at the expiration of the time for which he was hired, the whole of his stipulated wages.—not on a quantum meruit, but by virtue of the special contract, his own part of which he may then safely aver that he has performed, his readiness to serve during the rest of the term being considered equivalent in law to actual service; and it has been thought that he may sue in indebitatus assumpsit, that being no more than any creditor may do upon an executed special contract, and his action, though not special in its form, being still upon the special contract and supported by the same evidence by which a special count would be substantiated. Crandell v. Pontigny, 4 Camp. 375, is a direct authority in favour of these positions.

That was an action brought by a clerk for his whole quarter's salary against his master, who had wrongfully dismissed him in the middle of a quarter: the declaration only contained the common count for work and labour. Lord Ellenborough: "If the plaintiff was discharged without a suf-

ficient cause, I think this action maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was therefore indebted to him for work and labour in the sum sought to be recovered."

[This peculiar view of the rights] of servants and agents wrongfully dismissed, resulted altogether from the doctrine of constructive service, which originated in decisions on the law of settlement; and though it may be applicable to some other cases (see Collins v. Price, 5 Bing, 132) it seems difficult to understand how it can be rationally applied to most other cases of special contract. For instance, in Planché v. Colburn it would have been impossible for Mr. Planché, with much show of reason, to contend that he had constructively written the whole treatise on armour, when, in point of fact, he had only finished half of it. It has, however, been applied to cases of servants, clerks, and agents; and perhaps, therefore, the result of the authorities on this subject may be, that a clerk, servant, or agent wrongfully dismissed, has his election of three remedies: viz., that,

- 1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. *Pagani* v. *Gandolfi*, 2 C. & P. 370.
- 2. [It was once thought] that he might wait till the termination of the period for which he was hired, and might then sue for his whole wages [as a debt due to him in respect of complete performance of the contract on his part], relying on the doctrine of constructive service, (fandell v. Pontigny; and see Collins v. Price, 5 Bing. 132; and Smith v. Kingsford, 3 Scott, 279, vide tamen the observations of the judges in Smith v. Hayward, post. [See also Fewings v. Tisdal, 1 Exch. 295, and the opinions of the judges in Emmens v. Elderton, 4 H. of Lords Cases, 624. It is now, however, clear that this remedy is not open to him, for he cannot allege that the defendant is indebted for work done; but it does not follow from Fewings v. Tisdal that a special action of debt averring a contract to pay, a continuing readiness on the part of the servant during all the period to serve, and a dispensation from the service on the part of the master, might not be maintained. See the opinion of Mr. J. Crompton in Emmens v. Elderton, ubi supra.]

3. He may treat the contract as rescinded, and may *immediately sue*, on a *quantum meruit*, for the work he actually performed; *Planché* v. *Colburn*; but in that case, as he sues on an implied contract, arising out of actual services, he can only recover for the time that he *actually* served.

This last was the point really decided by Lord Tenterden in Archard v. Horner, 3 C. & P. 349, a case sometimes (though, it is submitted, inconsiderately) cited for the purpose of showing that a servant wrongfully dismissed cannot after the expiration of the term for which he was hired sue in indebitatus assumpsit for a compensation for any longer period than he has actually served. In that case the plaintiffs declared on a special count, stating a hiring for a year, adding a count for wages. It turned out that the hiring was for a year, determinable by a month's notice. Lord Tenterden held that they could not recover on the first count, on the ground of variance, nor on the second for more than the period of actual service; and as a sufficient sum had been tendered to cover that, he directed a non-suit. It would appear that in this case the action was commenced before the expiration of the term, and, if so, Lord Tenterden's ruling is perfectly reconcilable with the case of Gandell v. Pontigny; and this it probably was which, on its being contended in Ridgway v. Hungerford Market Co., 3 A. & E. 171, that the plaintiff, a dis-

missed clerk, who had waited till the expiration of the term before bringing his action, could not maintain indebate tas assempsit for his whole wages elicited from Mr. Justice Coloridge the remark that, "if it were necessary he should have wished for time to consider how far this question is determined by the dectrine laid down by Lord Tenterien in Archively Harrer."

That the decision of Lord Tenterden, in Archard v. Horner, proceeded on the grounds above stated, has been since asserted by the court, in Smith v. Hayward, 7 A. & E. 544. In that case the plaintiff had been hired from June 1st for a year, determinable by three months' notice. He was turned off without notice on September 19th, and commenced an action on September 22nd, having previously offered to serve the entire quarter. The declaration contained a special count on which the plaintiff failed, by reason of a variance, and an indebitatus count, upon which 4l., being a sufficient sum to cover the period of actual service, i.e., to the 22nd of September, was paid into court. He was held to be entitled to no more, upon the ground, that (whatever might have been the result if he had waited till the end of the year or of the current quarter) he could not recover on the indebitatus count in respect of work done during a time which had not clapsed when he commenced his action. It must be admitted that the Judges cast strong reflections upon Gandell v. Pontigny, without, however, overruling it.

It would not be right to quit this subject without noticing the case of Furdly v. Price, 2 N. & R. 333, in which a different construction from any that has been yet suggested, was put upon a contract very similar to that in Archard v. Horner. The declaration contained a count for schooling, lodging, board, meat, drink, &c. The last count stated, that in consideration that the plaintiff had, at the request of the defendant, received J. W. as his scholar, and that J. W. had left the plaintiff's school without due notice, the defendant promised to pay the plaintiff as much money as he therefore reasonably deserved to have. It appeared that the defendant had sent J. W. to this plaintiff's school, and taken him away without notice, the terms of the school being, that "a quarter's notice is required to be given before the removal of any young gentleman, or to pay for a quarter" The plaintiff having recovered for a quarter, it was contended, on a motion for a new trial, that the special count was not proved, and that the piaintiff could not recover on the indehitatus count, because the consideration was not actually executed. The court, however, held it was so.

"The terms of the school," said the Lord Chief Justice, "are, that 301. a year shall be paid; but that if the scholar shall be taken away without notice, an additional quarter shall be paid. Still, however, the thing to be paid for is that which has been supplied. The price for half a year is 151.; but if, at the end of half a year, the scholar is taken away without a quarter's notice, the price for the first half-year is 151, and 171, 108."

But Eardly v. Price has since been overruled by the case of Fewings v. Tisdal, 1 Exch. 295. That was an action of indebitatus assumpsit for wages as a hired servant, and was brought to recover a month's wages claimed by the plaintiff, who, being a yearly servant, had been discharged without notice, and received wages to the time of her dismissal only. The under-sheriff before whom the cause was tried, non-suited the plaintiff, upon the ground that the declaration should have been special, and the Court of Exchequer held he was right in so doing.

"It seems to me," said Baron Parke, in his judgment, "that the true nature of the contract between a master and his servant amounts to this, that it

is an agreement for a year's service, with the addition that the master may turn the servant away at any time, on giving him a month's warning, or in lieu of that, a month's wages. It is refining to say that the month's wages given under such circumstances, are an additional compensation for the bygone service; and I cannot help thinking that, in $Eardly \ v. \ Price$, the Court of Common Pleas, in order to obtain justice for that particular case, broke in upon the rules of law. $Archard \ v. \ Horner$ is, in my opinion, very good sense, and lays down a good rule."

The right to rescind the contract at any time by giving a month's notice, or in lieu thereof a month's wages, only exists in the case of contracts with menial servants. See Broxham v. Wagstaffe, Exch. H. T. 1842, 5 Jur. 845. [And it seems that in such cases the servant cannot claim hoard wages, Gordon v. Potter, 1 F. & F. 644.]

Since the case of Fewings v. Tisdal, and the observations of the Judges in Smith v. Hayward, before referred to, [it can hardly be doubted] that the case of Gandell v. Pontigny, would not be supported at the present day; and [the opinion] expressed above (p. 49) that a servant wrongfully dismissed cannot wait till the termination of the period for which he was hired, and then sue on the common counts for his whole wages, treating the service as constructively performed, is strengthened by the observations of Patteson and Earle, JJ., in Goodman v. Pocock, 15 Q. B. 576, a case which appears to have shaken still further the ruling in Gandell v. Pontigny.

In Goodman v. Pocock, the plaintiff, a commercial traveller, hired for a year at wages payable quarterly, and wrongfully dismissed in the middle of a quarter, had brought an action for wrongful dismissal, and the declaration contained a special count for the dismissal, and also an indebitatus count for work and labour. The judge who tried the cause directed the jury not to take into account the services rendered during the broken quarter, as these services were only recoverable under an indebitatus count, and the particulars of demand did not include any such claim. The jury gave damages accordingly, excluding any remuneration for the services during the broken quarter. The plaintiff thereupon brought a second action, claiming under an indebitatus count the value of those services; but the court held that the second action was not maintainable, as the plaintiff had, by his former action, treated the special contract as still open, and having recovered damages on that footing, he could not afterwards sue on an indebitatus count, treating the same contract as rescinded. The court also held that in the first action the jury ought to have been directed to take into consideration the services actually rendered during the broken quarter, in awarding damages under the special count. See also the observations in the judgment of the Exch. Chamber in Elderton v. Emmens, 6 C. B. 178; [S. C. in Dom. Proc. 4 H. of Lords Cases, 624]; Snelling v. Lord Huntingfield, note (b), 1 C. M. & R. 26, and Walstab v. Spottiswoode, 15 M. & W. 501.

[In Cuckson v. Stones, 1 E. & E. 248, where a contract had been entered into by the plaintiff to serve the defendant for ten years in the capacity of a brewer, and the defendant had undertaken to pay to the plaintiff a weekly sum during that term, it was held that a temporary illness of the plaintiff, not amounting to or treated as a dissolution of the contract, did not disentitle him to recover the weekly payments in respect of the time during which he had, through illness, been unable to work; the contract being still in force, and having been so dealt with by the defendant.]

Assuming the position to be correct, that a servant or agent, wrongfully

dismissed, may wait till the expiration of the term, and then maintain an action in the nature of inchalities essuages for his whole wages questions may arise as to his conduct in the intermediate time, and how far it may afford the master a defence, or ground for mitigating damages—as, for instance, if he have before the expiration of his term hired himself to another master. See Comming v. Colymbia, 6 Dowl. 373; and Speck v. Phillips, 5 M. & W. 279.

A question may also arise, how far the first master may be entitled to his intermediate earnings, by virtue of the doctrine asserted in Thompson v. Haraback, 1 Camp. 527; Diplock v. Blackbarne, 3 Camp. 43; Morrison v. Thompson, L. R. 9 Q. B. 480.] See Patasare v. t. Barra, 4 Tyrwh. 840, and 1 C. M. & R. 65.

Where the contract of yearly service is put an end to by consent in the middle of a quarter there is no implied contract to pay pro rate, but a new agreement to pay for the broken part of the year's service may be inferred from circumstances, which should therefore be submitted to the jury: I amburn v. Cruden, 2 M. & G. 253; and see Thomas v. Willheams, 1 A. & E. 685.

There is a class of cases in which a special contract remains open, but something has been done by the plaintiff beyond what he was to perform according to the contract and that has been done at the instance of the defendant. In such cases the extra work, not being under the contract at all, is the subject matter of an action in the nature of indialities assumpsit; yet the contract must be proved, in order that it may appear how much was extra. Buxton v. Cornish, 12 M. & W. 426.

BICKERDIKE v. BOLLMAN.

MICH. 27 GEO. 3.-IN THE KING'S BENCH.

[REPORTED 1 T. R. 405.]

A., a creditor of B. to the amount of 115l. 3s. 8d., took his bill for 20l. on C., who had not then, nor afterwards, any effects of B. in his hands. The bill when due was dishonoured, and no notice thereof was given by A. to B.; still A.'s demand on the bill was not discharged, but he may sue out a commission of bankrupt against B., and his debt will support it.

Case for money had and received to and for the use of the bankrupt, before his bankruptcy. 2nd count. On an account stated with the bankrupt. 3rd. For money had and received to and for the use of the plaintiffs as assignees. 4th. An account stated with the assignees. Plea, non assumpsit.

This cause was tried at the last assizes for the county palatine of Lancaster, before *Buller*, J., when the jury found a verdict for the plaintiffs, subject to the opinion of this court, on the following case:

That the act of bankruptcy was committed in the middle of August, 1784. That in the month of August, 1784, the bankrupt was indebted to Greatrix and Co., the petitioning creditors, in 1151. 3s. 8d. That on the 15th of September, 1784, the bankrupt drew a bill for 201. on the defendant (a), "who then until the time of the bankruptcy, and of the bill becoming due, was a creditor of the bankrupt," payable to Greatrix and Co. two months after date, and paid the same to them on account of their said debt; which bill was presented for payment on the

⁽a) The words between the inverted commas were added by the court, both parties.

18th of November following and dishonoured. That no notice of the non-payment of the bill was ever given by Greatrix and Co. to the bankrupt, or left at his house. That Greatrix and Co. received the bill at Manchester on the 24th of November, between the hours of eleven and twelve at noon; but the past goes from London to Manchester in three days. The bankrupt then resided at Manchester; but in general secreted himself, and particularly on market days, after the 20th of November, on which day a commission of bankrupt issued against him, and he was declared a bankrupt at Manchester under that commission, in the afternoon of the 24th of November, but at what hour did not appear; and that commission has since been superseded. Afterwards another commission was issued on the petition of Greatrix and Co.

The question for the opinion of the court is, whether the debt, proved to be due to them under the circumstances above mentioned, is sufficient to support that commission?

Chambre, for the plaintiff (after observing that the objection which had been raised to the petitioning creditor's debt was, that the bankrupt was to be considered as discharged from the bill for 20%, which he had drawn in favour of the petitioning creditor, no notice having been given to the bankrupt of the bills having been dishonoured,) made three questions:

1st. That no notice was necessary to be given to the bankrupt in this case. 2ndly. That even if notice were necessary, it had virtually been given. 3rdly. That it was not competent to the defendant in this action to make the objection.

As to the first, notice must in general be given; but most of the cases have arisen where the holder has given indulgence to the acceptor, by which he is considered as having made his election, to look to the acceptor only for payment. The reason on which the rule, requiring notice to be given to the drawer, is founded, is on a supposition that he may have effects in the hands of the drawee, and that he ought to have an opportunity of recovering satisfaction from him; and a presumption arises that the drawer will suffer from the probable insolvency of the drawee, in consequence of the holder's neglecting to give notice. But in this case that presumption is repelled by stating that the bankrupt was a debtor to the drawee; therefore the rule does not apply. By an ordinance of France (a), the drawer,

⁽a) Postlethw. tit. Bills of Exchange, 16 and 77 art.

in order to discharge himself from the payment of a bill on account of his not having had notice of the non-acceptance by the drawee, must show that he had effects in the other's hands at the time of drawing. The rule requiring notice to be given to the drawer was introduced for his protection, and therefore ought not to be abused so far as to enable him to do injustice.

Secondly. As this case does not fall within the reason on which the rule of law is founded, the bankrupt, not having had effects in the hands of the drawee at the time that the bill was drawn, must be considered as having had virtual notice that the bill was not honoured. Supposing, however, that the rule of law would be inflexible in an action on the bill itself, yet the question here is not altogether whether the drawer can be resorted to on the bill, but whether the circumstances here stated extinguish the preceding debt. But it has been repeatedly held that the mere drawing of a bill of exchange does not extinguish the preceding debt.

Thirdly. The case of Quantock and others against England (a) is decisive. On a question whether a debt barred by the Statute of Limitations was sufficient to found a commission of bankrupt upon, Lord Mansfield said, "The Statute of Limitations does not destroy the debt; it only takes away the remedy. Here the debtor himself has not objected; he has submitted to the commission, and been examined under it; therefore the objection does not now lie in the mouth of a third person;" and he said that Swain and Wallinger (b) was in point. In this case the notice to be given was for the benefit of the bankrupt, and the slightest acknowledgment would be considered as a waiver of it.

Buller, J. The bankrupt bimself could not waive it after the bankruptey.

Chambre. But the assignees may waive it for the purpose of supporting the commission.

Law, contra. The debt of the petitioning creditor being reduced under 100l. by the bankrupt's drawing the bill in question, is as much discharged by the laches of the holder in not giving notice of the non-acceptance of the drawee, as by actual payment. And as to the assignees waiving this objection, it is no answer in the present action. For in all cases where actions

are brought by the assignees of a bankrupt, they must make out a clear title, which they cannot do without proving a legal debt of the petitioning creditor; and they cannot by their own act make that a good debt which would not be so otherwise.

As to notice not having been necessary because the drawer had no effects in the drawee's hands, that goes to measuring the inconvenience which would result in every particular case from not giving notice. But the court have always said that, whether any actual change of circumstances has or has not taken place, or whether the drawer may or may not have suffered from the negligence of the holder in not having given notice in due time, it is a strict rule of law, introduced for the sake of certainty, and that the drawer may have an opportunity of resorting to the drawee. In the case of Peach and Burgess (a), where a question arose upon the necessity of notice being given to the drawer, it was contended that no change of circumstances had taken place, or probable inconvenience had ensued, from want of notice; but Lord Mansfield said, it was a strict rule of law that notice should be given, and it must be adhered to in every case. This case does not come within the rules laid down in the cases of Tindal and Brown, or Medealf and Hall (b), as to what shall be deemed sufficient notice of non-payment or non-acceptance; because here there was no notice at all. It was said by Lee, in arguing the case of Russell and Langstaff (c), and not denied by the court, that it had been frequently ruled by Lord Mansfield at Guildhall, that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise.

The bills having been given after the act of bankruptcy, does not vary the present case; because a debt may be discharged in due course of trade, either by payment of the money after a secret act of bankruptcy, or by payment of the bill, or by dishonouring it.

With regard to the debt's being extinguished by taking this note from the bankrupt; by 3 & 4 Anne, c. 9, s. 7 (d), it is enacted, that "if any person accept a bill of exchange for 20l.

⁽a) Sittings at Guildhall, cor. Lord Mansfield.

⁽c) Dougl. 514.

⁽b) Tr. 22 G. 3.

⁽d) [Made perpetual, 7 Anne, c. 25,

s. 3.]

or upwards, in satisfaction of any former debt, the same shall be accounted a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof." Here there was neither protest nor notice, and therefore the bill must be considered as complete payment.

Chambre, in reply, was stopped by the court.

Ashurst, J. As to the general rule, it has never been disputed, that the want of notice to the drawer, after the dishonour of a bill, is tantamount to payment by him. But that rule is not without exceptions; and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hand of the drawee (a); for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. In this case it appears that, at the time of drawing the bill, the drawer, so far from having any effects in the hands of the drawee, was actually indebted to him to a large amount.

But even admitting this to be a general rule without any exception, it was certainly introduced for the benefit of the drawer. Now every rule may be waived by the person for whose benefit it is introduced. Under the circumstances of the present case, the drawer must be considered as having waived this benefit, because the commission is founded on that creditor's debt, between whom and the drawer this transaction has happened; and his submitting to it is a waiver of the want of notice, and an admission of the debt; which admission the assignees have subsequently confirmed by bringing this action. Therefore I think that as the bankrupt himself has not chosen to take advantage of it by moving to supersede the commission, it does not now lie in the mouth of a third person to do so.

Buller, J. The last point may be laid entirely out of the case, because, unless the objection be well founded in the case of the bankrupt himself, it is immaterial to consider how far it was competent for a third person to take advantage of it. The case of Quantock and England does not apply. There the question was, whether a third person should be permitted to avail himself of the Statute of Limitations. There might be

good reasons for disallowing it in that case, because the debt still remained in conscience. But here the question is, whether there was a sufficient debt to support the commission at the time when it issued.

The first point to be considered is, whether, under these circumstances, it was necessary to give notice within as short a time as could conveniently be done, that the bill was neither accepted nor paid. I am of opinion that no such notice was necessary. On the second trial of the cause of Timbal and Brown before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that where a bill was accepted, it was primit facil evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt.

The law requires notice to be given, for this reason, because it is presumed that the bill is drawn on account of the drawer's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice (a). Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonoured, because he had no effects in the hands of the person on whom the bill was drawn. The verdict never was objected to; and if it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due, the drawer [drawee] never had any effects of the drawee [drawer] in his hands, I think notice to the drawer is not necessary; for he must know whether he had

effects in the hands of the drawee or not; and, if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. On these grounds I think the petitioning creditor's debt was sufficient to support the commission.

Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not, whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this. A. not having any effects in C.'s hands, draws a bill of exchange for 1001. on him, in favour of B., for value received. Now if C. does not accept, and B. does not give notice to A., there is an end of the bill. Then how does the case stand? A. has 1001. of B.'s in his hands, without any consideration, which therefore B. may undoubtedly recover in an action for money he had and received.

Per Curiam.

Let the *Postea* be delivered to the plaintiffs.

[Though the law as to notice of dishonour is now codified by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), nevertheless, as there have been few cases decided upon its construction, it has been thought desirable to retain the following note, which deals with the state of the law at the time when it came into operation.]

In Goodall v. Dolley, 1 T. R. 712, in which case the action was brought against the payee, Buller, J., intimated that, had the action been against the drawer, the case would have been governed by Bickerdike v. Bollman. And in Rogers v. Stephens, 2 T. R. 713, the decision was partly founded on Bickerdike v. Bollman, which Grose, J., said had been well considered; and in Legge v. Thorpe, 12 East, 171, an action was brought by the indorsee against the drawer of a foreign bill drawn on one Wyatt; the declaration negatived effects in the hands of the drawee or any consideration for the bill. It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused to accept, but that Wyatt was one of the executors of a person called Weeks, and that Weeks' executors had desired the defendant to employ the payee of this bill to do some work on Weeks' property; and the defendant therefore drew this bill on Wyatt to settle with the payee. Wyatt denied that he had assets to pay the bill. The only question was, whether a protest of non-acceptance was necessary; Lord Ellenborough thought not, and the plaintiff had a verdict; and on a motion for a new trial, the whole court thought the case governed by Bickerdike v. Bollman, and discharged the rule.

Claridge v. Dolton, I.M. & S. 226, is another strong examplification of this doctrine. There the drawer of a bill had no effects in the hands of the drawer, but had supplied him with goods upon a credit, which would not, however, expire till long after the bill would become due. He was held not to be entitled to notice of its dishonour. The case of Biel will a Boltoman," said Mr. J. Bayley, "has established, and I am disposed to think, rightly, that a party who cannot be prejudiced by a want of notice, shall not be entitled to require it."

In analogy to the rule which dispensed with notice in such cases as the above, it has been held, that it is unnecessary as against the drawer to present such a bill on the day of its becoming due. Terry v. Perker, 6 A & F 502. Wirth v. Austen, L. R. 10 C. P. 689.

But even in the very cases in which *Bickerdike* v. *Bollman* has been acted upon, it has been declared, that the rule established in that case must not be extended. In *Claridge* v. *Dalton*, Mr. Justice Le Blanc went so far as to regret that any such decision had ever taken place, and see the judgment delivered by Baron Parke in tarter v. *Placer*, 16 M. & W. 743, and the judgment of Lord Campbell, C. J., in *Pararel* v. Wusee, 1 E. & B. 804; *Turner* v. Samson, 2 Q. B. D. 25, per Brett, L. J.

Accordingly it was settled that the drawer is entitled to notice, though he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee. Rucker v. Hiller, 3 Camp. 217; 16 East, 43. So it was laid down by Lord Eldon in a case of bankruptey, that, "if a bill were accepted for the accommodation of the drawer, and there were nothing but that between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable: but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects; and if, in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental." For Heath, 2 Ves. & Bea, 240: 2 Rose, 141.

And this rule, thus laid down by Lord Eldon, extended to cases where the drawer had reason to expect that some third party would provide for the payment of the bill; thus in Crop v. Scott. 3 B. & A. 619, where the bill was drawn and accepted for the accommodation of the first indorsee, the drawer was held to be entitled to notice; and the same point was decided in Norton v. Pickering, 8 B. & C. 610. And the same rule prevailed though the person expected to provide funds was not a party to the bill. Lapitte v. Slatter, 6 Bing, 623.

If the drawer had funds in the drawee's hands sufficient to meet the bill, even in part, though not wholly, he was entitled to notice, Thurkeray v. Blackett, 3 Camp. 164. [But see Carer v. Duckworth, L. R. 4 Ex. 313.] If the drawer had made a provision to have funds in the drawee's hands to meet the bill, he had a right to notice, though the funds might not have actually arrived there, Robins v. Gibson, 3 Camp. 334. And if the drawer had effects at the time when the bill was drawn, he did not lose his right to notice, although before the time of payment he might have ceased to have any, Orr v. Magennis, 7 East, 359, or was indebted to the drawee in a larger sum, Blackhan v. Doren, 2 Camp. 503.

These are strong cases, especially Orr v. Magennis, for there the drawer could, at the time when it fell due, have had no reasonable expectation that

the bill would be paid, and could have sustained no prejudice from the want of notice; so that that case may be considered as going the length of deciding that if, at any time after the bill was issued, the drawer could have reasonably expected that it would be paid, he had a right to notice. Thus in *Hammond v. Dufrene*, 3 Camp. 145, it was held unnecessary that the effects should be in the drawee's hands when the bill was drawn, if they were there before it became due, [and see *Carew v. Duckworth*, L. R. 4 Ex. 313.]

Although it was said by Mr. J. Bayley, in Claridge v. Dalton, as above stated, "that a party who cannot be prejudiced by want of notice, shall not be entitled to require it," still the application of this dictum must be confined to the particular description of case then before the court; for we have seen that it does not extend to such a case as Orr v. Magennis. So, too, it is difficult to conceive how the drawer could be prejudiced by want of notice, where the drawee had become bankrupt or notoriously insolvent. Yet in both those cases, he was unquestionably entitled to it. See Russell v. Langstaffe, Dougl. 514, referred to in the text; Esdaile v. Sowerby, 11 East, 114; and in Dennis v. Morrice, 3 Esp. 158, Lord Kenyon refused evidence tendered for the purpose of showing that the drawer was not prejudiced by want of notice. In fact, to use the words of the Lord C. J. Tindal and Mr. J. Bosanquet, in Lafitte v. Slatter, 6 Bing. 627, "Bickerdike v. Bollman is an excepted case, the principle of which is not to be extended." See also Caunt v. Thompson, 7 C. B. 409, where it was said by Cresswell, J., delivering the judgment of the court. "It may be assumed to be a settled rule that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it, ... so also it may be considered as settled that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say that knowledge of the dishonour of a bill is not equivalent to notice." It appears, however, from the case last cited, that where the drawer was himself the party to pay the bill (for instance where he was the executor of the acceptor) his knowledge that the bill had been presented to him, and was unpaid, was equivalent to notice.

[In re Leeds Banking Co. Ex parte Prange, L. R. 1 Eq. 1, it was held that an indorsement payable "in need" at a particular bank, did not render the bank notified the agents of the indorsers to receive notice of dishonour, and that therefore, although the drawer and acceptor had become bankrupt before the bill became due, notice to the bank was not notice to the indorsers, nor could presentment for payment even to the indorser himself, operate per se as notice of dishonour by the acceptor.

It seems, however, from the expressions of the court in the case of Fitzgerald v. Williams, 6 Bing. N. C. 68, that in pleading the want of notice [was] primâ facie sufficiently excused by showing that there were no funds in the drawee's hands; and it was decided there, that where the declaration averred that there were no funds in the drawee's hands, nor any consideration for the acceptance, and that the defendant sustained no damage from the want of notice, it lay upon the defendant to prove the damage if any resulted.

But the circumstances which would amount to a sufficient excuse for want of notice as against the *drawer*, did not always excuse want of notice to an *indorser*. Where an action was brought by the indorsee of a promissory note against the indorser, to whom it had been indorsed by the payee, the declaration alleged, that neither at the time the note was made, nor afterwards and

before it became due nor when it became due and on presentment for payment had the maker or payer any effects of the defendant in his hands, nor was there any consideration or value for the making of the note of the payment thereof, or its innersement by the payer to the ordinality and that the detendant had not sustained any diamage by reason of his not having had no tice of the non-payment of the note. It was held that as against an improve the declaration did not state a sufficient excuse of want of notice of dishonour, as it was consistent with the averments in the declaration, that the note might have been indorsed by the defendant for the accommodation of a prior party, in which case the defendant would be entitled to notice of dishonour Curter's Flower, 16 M & W 743 | accordingly by Ferrer's Series in 2 Q B D 25, 46 L J Q B 167, where as between all the parties to an accommodation bill the intention was that the last indorser should pay it, it was held in an action against a prior indorser that he was entitled to notice of dishonour; and see Estery Patter 2 (P. D. 18. 46 L. J. C. P. 77) Where no notice had been given at any time, the excuse must have been set out on the record; if it had been given, but at a time which would be too late in the usual course, the matter of excuse might probably have been used to show that it was, under the circumstances, in reasonable time; Judgment, Carter v. Flower, ubi sup. See where the indorser was held not to be entitled to notice, Corney v. Mendez da Costa, 1 Esp. 302, and, as to what excuses were sufficient in the analogous case of presentment for payment, see Sands Obiok₁ S.C. B. 751 But I in Jun Diameter Land v. Bit it of February, L. R 3 P. C. 526; Charten, at a Beat v Dubs at I R 5 P C 574, and s 46 of the recent statute, post.

In the earlier cases, notices of dishonour were strictly construed by the courts, and were often held to be insufficient upon very technical grounds. The disposition of the courts, in the later decisions, was to construe these notices more liberally; and before the Bills of Exchange Act, 1882, it had been established that, although the notice must intimate that the bill had been presented and dishonoured, it was not necessary that the person to whom it was addressed should be informed, in terms, that the holder looked to him for payment. See Para v. Starrand, 2 Q. B. 388; Shallow v. Brachwarte, 7 M. & W. 436; Miers v. Brown, 11 M. & W. 372; Rowlington v. Space etc. 14 M. & W. 7; Chard v. Fox, 14 Q. B. 200; Mellersh v. Loyen, 7 Exch. 578; Metcalfe v. Richardson, 11 C. B. 1011; and Paul v. Joel, 4 H. & N. 355; Viall v. Michael, Q. B. 30 L. T. 433 Ex-parts Lowenthal, L. R. 9 C. H. 591. As to what was reasonable diligence in giving notice of dishonour, see Gladwell v. Turner, L. R. 5 Ex. 59; Berridge v. Fitzgerald, L. R. 4 Q. B. 639. In re-Leeds Banking Co., L. R. 1 Eq. 1; Prideaux v. Cribble, L. R. 4 Q. B. 455; Thywcod v. Pickering, L. R. 9 Q. B. 428; notice of dishonour to the drawer himself might be sufficient notwithstanding that he had been bankrupt and a trustee had been appointed, ex parte Baker, 4 Ch. D. 795; 46 L. J. Bkey, 60.

A subsequent promise to pay made by an indorser of a bill who has had no notice of dishonour, was evidence of a waiver of the right to notice. See Woods v. Dean, 3 B. & S. 101; Cordery v. Colville, 32 L. J. C. P. 210.

It may here be noticed that by some foreign laws, notice of dishonour is given through an official channel, and so that the receipt of it by an indorser residing out of the country may be matter of courtesy or chance. It had been held that the drawer or indorser in England of a bill directed to a person residing in such foreign country, is only entitled to the notice which its law prescribes; a proposition which, though, perhaps, not sustainable upon

the grounds on which it was rested in *Rothschild v. Currie*, 1 Q. B. 43, will be found, it is submitted, upon examination, to have reason as well as convenience in its favour (see *Hirschfield v. Smith*, L. R. 1 C. P. 340; 35 L. J. C. P. 177). It had been afterwards approved and adopted in the Court of Appeal in *Horne v. Rouquette*, 3 Q. B. D. 514, where, though the court questioned the reasoning of *Rothschild v. Currie*, they adopted the decision. *Horne v. Rouquette* indeed went one step further, for the court unanimously regarded as immaterial the fact that the bill there sued on was a foreign bill, and held that the rights of an indorser in England to notice of dishonour might be modified by the fact that the bill had been subsequently indorsed in a country where notice of dishonour was not necessary. In that case the plaintiff had indorsed the bill in Spain, where it would seem that notice of dishonour by non-acceptance is not necessary, and had himself consequently become liable upon it although he did not receive notice until long after the bill had been dishonoured.

On receiving notice of dishonour he, however, immediately passed it on to the defendant from whom he had taken the bill by indorsement in England. It was held that the defendant was liable. Cotton, L. J., indeed pointed out that the case did not decide that the plaintiff who took by indorsement in England could have recovered against the defendant had he delayed in passing on the notice of dishonour. It is submitted, however, that as in Hirschfield v. Smith, so in the case supposed, the real question would be, what was reasonable notice to give under the circumstances, and as any notice would have been practically nugatory after the delay which had already taken place, a plaintiff's right could hardly be defeated by any additional delay beyond that which is under ordinary circumstances permissible by English law. See further Rouquette v. Overman, L. R. 10 Q. B. 525, and the Notes to Mostun v. Fabrigas, ante, Vol. I. The same principle explains what at first sight appears anomalous, viz., that a person having certain rights under a contract made in this country should find those rights modified by matter subsequent which has taken place in a foreign country. For since the right of an indorser in England is to receive reasonable notice of dishonour, and since any person who indorses a negotiable instrument must be taken to know that it may circulate outside this country, reasonable notice may well be held to be such notice as having regard to the various places where the bill has circulated it has been possible for the party suing to give. See also per Wills, J., Lee v. Abdy, 17 Q. B. D. p. 314.

The sections of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which deal with the subject of this note are as follows:—

Sec. 97 enacts that,

- The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.
- The rules of common law, including the law merchant save in so far as they are inconsistent with the express provisions of this Act shall continue to apply to bills of exchange, promissory notes, and cheques.

Sec. 47, sub-sec. 2. Subject to the provisions of this Act when a bill is dishonoured by non-payment, an immediate right of recourse against the drawers and indorsers accrues to the holder.

Sec. 48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be

given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that 1 Where a full is dishonoured by non-acceptance and notice of dishonour is not given, the rights of a holder in the course subsequent to the emission, shall not be prejudiced by the emission. 2 Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Sec. 49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

- The notice must be given by or on behalf of the holder or by or on behalf of an indorser, who, at the time of giving it is himself liable on the bill.
- Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.
- 3. Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.
- 4. Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
- 5. The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.
- The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
- 7. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in the fact misled thereby.
- Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.
- 9. Where the drawer or indorser is dead and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.
- Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.
- 11. Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.
- 12. The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time unless:—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

- (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.
- 13. Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.
- 14. Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.
- 15. Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.
- Sec. 50. 1. Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.
 - 2. Notice of dishonour is dispensed with -
 - (a) When after the exercise of reasonable diligence notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:
 - (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived or after the omission to give due notice:
 - (c) As regards the drawer in the following cases, namely, (1) where the drawer and drawee are the same person; (2) where the drawee is a fictitious person, or a person not having capacity to contract; (3) where the drawer is the person to whom the bill is presented for payment; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill; (5) where the drawer has countermanded payment:
 - (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation.
- Sec. 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights and duties, and liabilities of the parties thereto are determined as follows:—
 - The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest is determined by the law of the place where such contract was made.

Provided that -

(b) Where a bill issued out of the United Kingdom conforms as regards requisites in form, to the law of the United

Kingdom it may, for the purpose of enforcing payment thereof be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (See Re Marsolles & t., 30 Ch. D. A98, 60 L. J. Ch. 116, a case declared upon bills drawn before the statute.)

- 2. Subject to the provisions of this Act, the interpretation of the drawing, indersement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such confinct is made. Provided that where an inland bill is undersed in a fore 2n country, the indersement shall, as regards the payer be interpreted according to the law of the United Kingdom.
- 3. The duties of the holder with respect to presentment for acceeptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done, or the bill is dishonoured.
- 5. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.]

One of the most clearly settled rules of all the law, is that neither the drawer nor the indorser of a bill of exchange shall be liable thereon unless the holder shall at the proper time present the same for acceptance or payment, and, in case of refusal, shall at once give to the drawer and indorser notice of such dishonor, or at least use reasonable diligence to do so. This has long been the recognized law in England and it has been fully accepted in the United States; Buck v. Cotton, 2 Conn. 126; Berry v. Robinson, 9 Johns, 121; McKinney v. Crawford, 8 S. & R. 351, 357. The contract of the drawer or indorser is only to be secondarily liable, and their responsibility is not absolute but conditional on their receiving due notice of the dishonor. The apparent exceptions to the rule are simply the ones which prove it. They can all be easily distinguished and a good reason is found for their existence; this reason is one which in the law always creates an exception to general rules, viz., fraud. In some form or other, the element of fraud is found in all cases where the stringency of the general rule seems to have been relaxed.

Many modifications of the general rule, laid down in this leading English case, have been made in this country, and many refinements have been gone into, but in the end we come back to the first proposition, viz., that fraud in some form or

other must be present to permit a departure from the strict rule.

It may safely be said that the drawer and indorser must always have notice before any liability on their part arises; they must have notice that the bill has not been accepted or paid at maturity. Notice is imperative, and in all cases except where fraud intervenes, the payee must make reasonably active efforts to advise the one secondarily liable so that he can take such steps as may be necessary for his own protection; but where fraud does intervene, the fraud is itself notice. If the bill is drawn with a full consciousness on the part of the drawer that there are no funds in the hands of the drawee, the drawer must know that he has no reason to expect anything except dishonor, and from the very moment of drawing the bill he has the fullest possible notice of the dishonor. Chief Justice Marshall extends the doctrine beyond the narrow limits of the English case by saying that although no funds were actually in the hands of the drawee when the draft was made, yet, if by previous arrangement the drawer had good reason to expect that funds would be provided to meet the bill, he would be free from the charge of fraud, and would be entitled to the customary notice; French v. Bank of Columbia, 4 Cr. 141. For cases establishing fraud as the distinguishing mark, see Stanton v. Blossom, 14 Mass. 116; Grosvenor v. Stone, 8 Pick. 79; Kinsley v. Robinson, 21 Id. 327; Dollfus v. Frosch, 1 Denio 367; Van Wart v. Smith, 1 Wend. 219, 227; Robinson v. Ames, 20 Johns, 146, 150; Hoffman v. Smith, 1 Cai. 157; Mobley v. Clark, 28 Barb. 390; Cathell v. Goodwin, 1 Harr. & Gill 468; Hill v. Norris, 2 Stew & P. 114; Yongue v. Ruff, 3 Strob. 311, 313; Bloodgood v. Hawthorn, 14 La. 124; Oliver v. Bank, 11 Humph. 74; Wollenweber v. Ketterlinus, 17 Pa. St. 399; Hopkirk v. Page, 2 Brock. 20; Dickins v. Beale, 10 Peters 572; Brower v. Rupert, 24 Ill. 182; Howes v. Austin, 35 Id. 396; Wood v. Price, 46 Id. 435; Welch v. B. C. Manuf. Co., 82 Id. 579.

If he had no funds at time of drawing, and he knew that fact, he is not entitled to notice. See Ford v. McClung, 5 W. Va. 156; Spear v. Atkinson, 1 Ired. 262; Denny v. Palmer, 5 Id. 610; Cedar Falls v. Wallace, 83 N. C. 225; Dunbar v. Tyler, 44 Miss. 1; Richie v. McCoy, 13 Sm. & Mar. 541; Mehlberg v. Tisher, 24 Wis. 607; Pitts v. Jones, 9 Fla. 519; Shaffer

v. Maddox, 9 Neb. 205; Armendiaz v. Serna, 40 Tex. 292; McRae v. Rhodes, 22 Ark. 315; Sullivan v. Deadman, 23 Id. 14; Bank v. Easley, 44 Mo. 286; Miser v. Trovinger, 7 Ohio St. 281.

At first sight it seems as though fraud must be presumed from the fact of drawing against "no funds" and some cases have gone on that theory; Fotheringham r. Price, 1 Bay 291; Baker r. Gallagher, 1 Wash. C. C. 461; Read r. Wilkinson, 2 Id. 514; Dickins r. Beal, 10 Peters 572. But something more is really needed: there must be circumstances or an absence of circumstances which shall clearly indicate fraud on the part of the drawer before he can be charged with notice and deprived of his customary privilege; Cruger r. Armstrong, 3 Johns. Cas. 5; Franklin r. Vanderpool, 1 Hall 78. See further: Curry r. Herlong, 11 La. An. 634; Anderson r. Folger, 11 Id. 269; Golladay r. Bank, 2 Head 61; Miser r. Trovinger, 7 Ohio St. 281; Wood r. McMeans, 23 Tex. 484.

That the holder may avail himself of the exception to the rule he must show affirmatively that there were no funds when the bill was drawn, and have been none up to the time of maturity; Golladay r. Bank, 2 Head 57; and to show this he must have more than simply a statement by drawee that the bill ought not to have been drawn, for in such case the drawee is not the agent of the drawer; Carle r. White, 9 Greenl. 104. In case the bill has been accepted, and then not paid at maturity, the burden is strongly on the holder to show "no funds," for presumably the drawer rightfully expected funds; Richie v. McCov, 13 Sm. & Mar. 541; Dunbar r. Tyler, 44 Miss. 1. Strictly the exception is confined to bills of change not accepted; in the case of notes we may have an analogous case, where a payee, knowing that there was no consideration for the note, indorses it over, in such case the indorser will not be entitled to notice; Gee v. Williamson, 1 Porter, Ala. 313. But usually it does not apply to a bill of exchange accepted, nor to a promissory note, — if the maker of a promissory note be insolvent the holder must still give notice to the indorser: Pons's Exec. v. Kelly, 2 Hay. (N. C.) 45. In all the cases where notice has been dispensed with we shall find the true reason to be fraud in one form or another. It is not absolutely necessary to constitute a fraud that the bill be drawn against "no funds." It is sufficient if through any fraudulent act of the drawer the bill

is presented against no funds. At the time of drawing the bill the funds may be in the hands of the drawee or reasonably on their way there, and at that moment the drawer may have no fraudulent intent whatever, but if he does any act in the interval before presentment, by which the funds are prevented from meeting the obligation, he is at that very moment charged with notice, for he must know of the certain dishonor which awaits the bill; Valk v. Simmons, 4 Mas. 113; Eichelberger v. Finley, 7 Harr. & J. 381; Harker v. Anderson, 21 Wend. 372; Sutcliffe v. McDowell, 2 Nott & McC. 251; Lilley v. Miller, Id. 257. Where the check or draft is drawn against funds in good faith, and later, through the carelessness or mistake of the drawer, they are withdrawn or applied to other uses, the cases seem to hold that if the drawer acted in good faith he is entitled to notice. It would seem hard to accuse him of fraud in such a case, but it would seem that another principle should apply and one more exception be grafted on the law, for where one of two equally innocent persons must suffer, the loss should fall on the one who made the mistake; but the cases do not go so far. It must appear, it seems, that the drawer knew that there would be no effects in order that notice to him may be dispensed with; Edwards v. Moses, 2 Nott & McC. 433; Orear v. McDonald, 9 Gill 350. Another exception to the general rule is where accommodation paper is involved; this, like fraud, always creates an exception. It is drawn for the benefit of the drawer, and he agrees to take it up. He is in this case primarily and not secondarily liable, and he has no claim to notice; he is required to see that it is paid when due, and must know of any default. This doctrine is supported by the following decisions: Hoffman v. Smith, 1 Cai. 157; Reid v. Morrison, 2 W. & S. 401; Evans v. Norris, 1 Ala. 511; and by dicta in the following cases: French v. Bank, 4 Cra. 160; Agan v. M'Manus, 11 Johns. 180; Holland v. Turner, 10 Conn. 308. So, too, in case of a draft indorsed for accommodation of drawer, with the knowledge of the indorser, where there was no expectation that the bill would be paid by the drawee, the indorser is not entitled to notice; Farmers' Bank v. Vanmeter, 4 Rand. 553. Nor is an indorser for whose accommodation the maker signed the note; Bank v. Ryerson, 23 Ia. 508; Holman v. Whiting, 19 Ala. 703. But the acceptor cannot require notice of a demand on drawer and a refusal, even though he

accepted for the accommodation of the drawer; Cox v. Bank, 28 Ga. 529. Nor can an indorser require notice where the maker is not liable to a bond fide indorsee before maturity and for value; Perkins v. White, 36 Ohio St. 530. Nor can one who is really a maker, although he signed apparently as an indorser; Raymond v. McNeal, 36 Kan. 471. But an indorser on an accommodation note, made for the benefit of the maker, as also the drawer of an accommodation bill, is entitled to notice; Bogy v. Keil, 1 Mo. 743; Denny v. Palmer, 5 Ired. 610; Sherrod v. Rhodes, 5 Ala. 683.

A third form in which the fraud may show itself is where the bill is regularly drawn, but later the drawer or indorser agrees to take care of it, thus assuming a primary liability. In such ease of course he is not entitled to notice; Bond r. Farnham, 5 Mass, 170. An attempt has been made to fix possible injury to the drawer or indorser as the distinguishing mark, but that really leaves it as before, for in contemplation of law, want of notice may always work injury, and it is by no means a case of damnum absque injuria; Bank v. Hughes, 17 Wend, 94. In the case of a guarantor the amount of possible, or, rather, actual injury, which has come to him from lack of notice, is sometimes allowed to be shown: Brackett v. Rich, 23 Minn. 485; Newton v. Diers, 10 Neb. 284; although it is usually held that a guarantor has no claim to notice, his liability not being conditional on that. The notice must be actual, or at least a reasonable endeavor must be made by the holder to give the notice. There is no such thing as constructive notice. Even well-known insolvency or bankruptcy of the drawee is not sufficient notice; something further must be shown. The rule has become arbitrarily fixed, and it makes no difference that as a matter of fact the drawer or indorser would have been in no better position had he been notified. The holder neglects to give notice at his peril.

And if funds were in the hands of the drawer, the drawee will be entitled to notice even if he did actually know of the insolvency; Cedar Falls v. Wallace, 83 N. C. 225. So, too, the insolvency of drawer or maker does not excuse not giving notice; Myers v. Coleman Anth. N. P. (N. Y.) 205; Bank v. Connoway, 4 Houst. (Del.) 206. The fraud has the effect of depriving only the one perpetrating it of notice; a fraud by a drawee would not affect a bonâ fide indorser nor vice versa. If

one indorser commit a fraud this must not affect another indorser in good faith. Fraud does not reach beyond the person; Bank v. Vanmeter, 4 Rand. 553; see also Fenwick v. Sears, 1 Cr. 259.

The exception in regard to accommodation paper does not act to deprive a bonâ fide indorser of his right to notice. He is as much entitled as though it were not accommodation paper; his position in each case is the same; he is only secondarily liable, and no circumstance except fraud on his part can make him anything else; French v. The Bank, 4 Cr. 141; Jackson v. Richards, 2 Cai. 343; Smith v. M'Lean, Taylor, N.C. 72; Richter v. Selin, 8 S. & R. 439; Holland v. Turner, 10 Conn. 308.

In the case of a bill drawn for the accommodation of the acceptor, the drawer occupies the same relative position. Under no circumstances is he primarily liable; hence he must have notice; Shirley v. Fellows, 9 Port. 300. Where the whole transaction is within a firm, i.e., when the drawer is a member of the firm on which the bill is drawn, or vice versa, the law implies that the knowledge of one is knowledge of all, and no formal notice need be given. In this case the law seems to accept the doctrine of constructive notice. If the firm shall fail to pay it is assumed that each individual partner, the drawer, etc., must have known of the fact of insolvency at once, and he could not take any step to protect himself, his individual liability remaining over and above what the firm could pay; Fuller v. Hooper, 3 Gray 334; Gowan v. Jackson, 20 Johns. 176; Porthouse v. Parker, 1 Camp. 82; New York Co. v. Meyer, 51 Ala. 325. If it be wholly within the firm the rule holds; Hill v. Bank, 3 Humph. 670. But if the transaction is between two firms consisting partly of the same members, the rule does not hold good and notice must be given; Dwight v. Scovil, 2 Conn. 654. See contra, New York Co. v. Selma Bank, 51 Ala. 305. Where the transaction is by the partners in their individual capacity, one as drawer, the other as indorser, notice is necessary; Morris v. Husson, 4 Sandf. 93; Foland v. Boyd, 23 Pa. St. 476.

The same rule does not apply to joint drawers or indorsers as to partners. Notice must be given to each to charge him; Sayre v. Frick, 7 W. & S. 383; Miser v. Trovinger, 7 Ohio St. 281; and Willis v. Green, 5 Hill 232, goes so far as to say that all

must have notice in order that any of them may be liable, and in case one be dead notice must be given to his estate. See on this point, also, People's Bank v. Keech, 26 Md. 521, and Dabney v. Stidger, 4 Sm. & Mar. 749, which case also holds that notice to the surviving partner is notice to the firm and sufficient to hold the estate of deceased. See vontra, Dodge v. Bank, 2 A. K. Marsh. 610; Higgins v. Morrison, 4 Dana 100. It is doubtful whether notice to one of two or more executors is notice to all; Cayuga Co. Bank v. Bennett, 5 Hill 236. This case decides that one executor has not power to waive notice, etc., so as to bind his executors. The whole tendency of the law seems to be to restrict the powers of one executor acting without his co-executors.

The same principle which applies in case of a partner drawing on his firm applies when the same party appears in the transaction in a dual capacity, whether it be as maker and indorser or as drawer and acceptor; Aughinbaugh v. Roberts, 4 W. N. C. (Pa.) 181; Smith v. Paul, 8 Porter 503.

When a stranger writes his name on the back of the bill or note, he makes himself prima facie a joint maker and is not entitled to notice; Baker v. Block, 30 Mo. 225; see Rachards v. Warring, 39 Barb, 55; Massey v. Turner, 2 Houst. (Del.) 79; Worcester Bank v. Lock-Stitch Fence Co., 24 Fed. Rep. 221.

A guaranter or surety, although not primarily liable, is not entitled to notice: the only condition imposed on his liability is that the one primarily liable shall fail to pay, then his liability arises: Allen r. Rightmere, 20 Johns. 365; Matthewson v. Sprague, 1 R. I. 8; Clark r. Merriam, 25 Conn. 576; Scott v. Shirk, 60 Ind. 160.

One case is contra and tries to make out that the guarantor is entitled to notice, except in the case of the insolvency of the original promisor; Brooks v. Morgan, 1 Harr, (Del.) 123. This case cannot be supported on principle. The whole theory of the exception is admirably summed up in these few words: "It is a maxim that no man shall take advantage of his own wrong;" Fotheringham v. Price, 1 Bay 291, 293. The fraud may be perpetrated by indorsing a bill or note which is tainted with usury, for in this way it is caused to be "presented against no funds." In such case nothing is transferred by the indorsement, the contract being void ab initio; Copp v. M'Dugall, 9 Mass. 1. The cases differ as to what is a sufficient allegation in the pleadings to permit proof of "no funds" as "notice."

In Frazier v. Harvie, 2 Litt. 180, both allegations were made, and there is a dietum that "no funds" was a necessary allegation. The following case points the same way; Hill v. Varrell, 3 Greenl. 233, 236.

The opposite view is taken in the following cases: Shirley v. Fellows, 9 Port. 300; Camp v. Bates, 11 Conn. 487, 493; Patton v. McFarlane, 3 P. & W. 419, 425; Spann v. Baltzell, 1 Fla. 301, 326; and it is held that an allegation of "notice" may be supported by any evidence which shows notice, - fraud, of course, being treated as notice, or any excuse for not giving notice. Of course the drawer or indorser may waive his privilege of notice; but in doing this it must clearly appear that he did so intentionally, with full knowledge of his rights; or else it must appear that he is estopped to deny full knowledge by having by his act put the holder in a worse position than he would otherwise have occupied, by making him believe a waiver was intended; Bruce v. Lytle, 13 Barb. 163; Trimble v. Thorne, 16 Johns. 152; Tebbetts v. Dowd, 23 Wend. 379; Bank v. Dill, 5 Hill 403; Bank v. Ashworth, 105 Mass. 503; Hopkins v. Liswell, 12 Mass. 52; Creamer v. Perry, 17 Pick. 332; Gove v. Vining, 7 Metc. 212; Whitaker v. Morrison, 1 Fla. 25, 32; Schmidt v. Radcliffe, 4 Strob. 296; Bank v. Wray, 4 Id. 87; Robbins v. Pinckard, 5 S. & M. 51; Merrimack Co. Bank v. Brown, 12 N. H. 320, 325; Norris v. Ward, 59 Id. 487; Bank v. Leathers, 10 B. Mon. 64, 66; Moyer's Appeal, 87 Pa. St. 129; Tobey v. Berly, 26 Ill. 426; Tardy v. Boyd, 26 Gratt. 631; Johnson v. Arrigoni, 5 Oregon 485; Matthey v. Gally, 4 Cal. 62; Harvey v. Troupe, 23 Miss. 538; Allen v. Harrah, 30 Ia. 363; Ballin v. Beteke, 11 Id. 204; Campbell v. Varney, 12 Id. 43; Freeman v. O'Brien, 38 Id. 406; Mense v. Osbern, 5 Mo. 544; Dorsey v. Watson, 14 Id. 59; Clayton v. Phipps, 14 Id. 399; Salisbury v. Renick, 44 Id. 554; Wilson v. Huston, 13 Id. 146; Bogart v. McClung, 11 Heisk. 105; Fell v. Dial, 14 S. Car. 247; Ford v. Dallam, 3 Cold. 67; Golladay v. Bank, 2 Head 57; Power v. Mitchell, 7 Wis. 161.

A waiver must be made with full knowledge of all the facts, but this will be presumed from a promise to pay. This presumption must then be rebutted by the promisor; Low v. Howard, 10 Cush. 159; Tower v. Durell, 9 Mass. 332; Myers v. Coleman, Anth. N. P. (N. Y.) 205; Kennon v. M'Rea, 7 Port. 175; and even though the money has been paid, if under a mistake it may be recovered back; Offit v. Vick, Walker (Miss.)

99. But this applies only to a mistake of fact. Every man is presumed to know the law, and if a man has simply erred from ignorance of the law he will not be protected; Creshire c. Taylor, 29 Ia. 492; Hughes v. Bowen, 15 Id. 446; Bank v. Ashworth, 105 Mass, 503; but see contra; Williams v. Bank, 9 Heisk, 441. The authorities are not agreed as to what constitutes a waiver; partial payment certainly does; for other acts it is necessary to go to the cases. For acts constituting waiver, see Knapp v. Runals, 37 Wis. 135; Sherer v. Bank, 33 Pa. St. 134; Bibb v. Peyton, H Sm. & Mar. 275; Umon Bank c. Govan, 10 Id. 333; Staylor v. Ball, 24 Md. 183; Moore v. Tate, I king's Dig. (Tenn.) 260; Mintuin v. Fisher, 7 Cal. 573; Leonard v. Hastings, 9 Id. 236; Pratte v. McCall, 1 Mo. 35; Airev v. Pearson, 37 Id. 421; Harness v. Savings Ass., 46 Id. 357; Tailer v. Murphy Furnishing Goods Co., 24 Mo. Ap. 420; Andrews r. Boyd, 3 Met. 434; Boyd r. Cleveland, 4 Pick. 525; Bank r. Cathn, 13 Vt. 39; Stahl v. Wolfe, 6 W. N. C. (Pa.) 143; Bank v. Connoway, 4 Houston 206; Cardwell v. Allan, 33 Gratt. 160; Whitridge v. Rider, 22 Md. 548; Riker v. A. & W. Sprague Mtg. Co., 14 R. I. 402; Duffy v. O'Conner, 7 Bax. 498.

The New York cases incline to construe all acts as waivers which they reasonably can; Rope v. Van Wagner, 3 N. Y. State Rep. 156; Spencer r. Harvey, 17 Wend, 489; Sheldon r. Horton, 53 Barb. 23; Sheldon v. Chapman, 31 N. Y. 644; Holling v. Sprague, 24 Wk. Dig. 67; Russell v. Cronkhite, 32 Barb. 282; Coddington v. Davis, 3 Den. 16. See contra; Bank v. Knower, Lalor's Sup. to Hill & Denio, 122; Lilly r. Petteway, 73 N. C. 358; Wheeler v. Souther, 4 Cush. 606; Creamer v. Perry, 17 Pick. 332; Freeman v. O'Brien, 38 Iowa 406; Olendorf v. Swartz, 5 Cal. 480. The cases agree that parol evidence of waiver is sufficient if made after the time of the indorsement; Power v. Mitchell, 7 Wis. 161; Dye v. Scott, 35 Ohio St. 194; Barclay v. Weaver, 19 Pa. St. 396; Hazard v. White, 26 Ark. 155; Rodney v. Wilson, 67 Mo. 123; Beeler v. Frost, 70 Id. 185; Baskerville v. Whitfield, 41 Miss. 535. In Pennsylvania, Ohio, and Arkansas parol waiver at time of indorsement may be shown; in the other States not. See Annville Bank v. Ket tering, 106 Pa. St. 531.

One partner may, without special authority, waive demand and notice of a bill drawn in the regular course of the partnership business. Farmers' Bank v. Lonergan, 21 Mo. 46. The terms of a written waiver, however, cannot be restricted by parol; Hayes v. Fitch, 47 Ind. 21. The question of waiver is said to be for the jury; Lary v. Young, 13 Ark. 401; Carmichael v. Bank, 4 How. (Miss.) 567; for the court, Wilson v. Huston, 13 Mo. 146. Notice is not waived by an offer of payment in depreciated bank bills without explanation; it is merely an offer of compromise; Newberry v. Trowbridge, 13 Mich. 263. Before maturity the indorser can waive only demand and notice; after maturity he can waive proof of demand and notice; Hoadley v. Bliss, 9 Ga. 303; Farmers' Bank v. Wapes, 4 Harr. (Del.) 429; Bryant v. Wilcox, 49 Cal. 47. Waiver does not extend beyond the person. To charge an indorser a demand must be made at maturity, although the maker has told the holder that he will not be able to pay it; Applegarth v. Abbott, 64 Cal. 459.

"Protest waived" dispenses with all legal steps after demand to charge drawer or indorser; Porter v. Kemball, 53 Barb. 467; Coddington v. Davis, 1 N. Y. 186; Shaw v. McNeill, 95 N. C. 535; Fisher v. Price, 37 Ala. 407; McIlvaine v. Bradley, 1 Disney (Ohio) 194; Fitch v. Citizens' Bank, 97 Ind. 211; Contin. Life Ins. Co. v. Barber, 50 Conn. 567. To waive demand there must be a waiver of demand; nothing less will do it. This of course also waives all subsequent steps; Jaccard v. Anderson, 37 Mo. 91; Sprague v. Fletcher, 8 Oreg. 367; Dye v. Scott, 35 Ohio St. 194.

A telegram sent by the indorser of a note to the collecting bank, requesting it to pay the note and save protest, and draw on him, is a waiver of both demand and notice; Seldner v. Mount Jackson Bank, 66 Md. 488. See, also, Corner v. Pratt, 138 Mass. 446.

If an indorser guarantees payment or acknowledges receipt of notice of protest, this relieves the holder from making demand or giving notice; City Savings Bank v. Hopson, 53 Conn. 453. Notice to assignee in bankruptcy of indorser is not sufficient; it must be personal; House v. Vinton Bank, 43 Ohio St. 346. See, also, Donnell v. Lewis County Savings Bank, 80 Mo. 165. Notice to the payee's assignee for the benefit of creditors may be sufficient to charge the indorser; Callahan v. Kentucky Bank, 82 Ky. 231.

Although protest is not necessary on an inland bill, yet its waiver in such case is construed to signify as much as when applied to foreign bills; Shaw v. McNeill, 95 N. C. 535. See,

also, Johnson v. Parsons, 140 Mass. 173. The waiver may be in the bill or note itself, then notice need not be proved; Bryant v. Taylor, 19 Minn. 396; Rooker v. Morris, 61 Ind. 286; Neal v. Wood, 23 Id. 523; Lowry v. Steel, 27 Id. 168; Smith v. Lockridge, 8 Bush 431. A waiver of notice of protest in a note payable to order, by all the parties to the note, binds the payee who indorses the note to make it negotiable; Woodward v. Lowry, 74 Ga. 148. The Tennessee act of Feb. 24, 1879, permitting a delay in protest and notice where an epidemic is prevalent, does not preclude an immediate notice; Hananer v. Anderson, 16 Lea (Tenn.) 340.

As to what constitutes due diligence, see America Bank v. Shaw, 142 Mass. 290. If the notice is directed to the indorser, giving the name of town and state, it is sufficient when the houses on the street are not numbered and there is no carrier's delivery; Morse v. Chamberlin, 144 Mass. 406. Notice to partners as indorsers is sufficient when left at the place of business with one in charge, or at the residence of either partner; St. Louis Bank v. Altheimer, 91 Mo. 190. Notice must be directed to the proper post-office of the indorser to bind him; Northwestern Coal Co. v. Bowman, 69 Iowa 150. See, also, Phelps v. Stocking, 21 Neb. 443.

Infancy of the maker of a note does not excuse the want of a demand on him by the holder in order to charge the indorser. Such a note is voidable only, not void, and infancy is solely a personal privilege; Wyman r. Adams, 12 Cush. 210.

Although the law allows no exception to the rule of notice save in ease of fraud, it is not so strict in defining notice as we might expect.

Due diligence on the part of the holder to give notice to drawer or indorsers is all that is required, and if for any reason he is unavoidably prevented from giving the notice at the proper time but does give it as soon as possible, or if for any reason the notice is not received, still he will be protected; Staylor v. Ball, 24 Md. 183; Robinson v. Hamilton, 4 Stew. & Port. 91; Foard v. Johnson, 2 Ala. 565; Roberts v. Mason, 1 Id. 373; Nevill v. Hancock, 15 Ark. 511; Winston v. Richardson, 27 Id. 34.

Various circumstances may render it impossible to make demand at the proper time or to give immediate notice, e.g., accident, interruption of communication, or sickness of the

holder, if it be both sudden and so severe as to prevent him from making demand or giving notice or having it done by some one else; Wilson v. Senier, 14 Wis. 380; Morgan v. Bank, 4 Bush 82. As soon as the impediment is removed the demand must be made and the notice given. If notice can be given, although demand is impossible, it must be given; Lane v. Bank, 9 Heisk. 419.

For cases showing what constitutes diligence, see Betts v. Cox, 2 City Ct. (N. Y.) 31; N. Y. Belting & Packing Co. v. Ela, 61 N. H. 352; United States Bank v. Burton, 58 Vt. 426; McClelland v. Bishop, 42 Ohio St. 113; Edmonston v. Gilbert, 3 Mackey (D. C.) 351; Morton v. Cammack, 4 MacArthur (D. C.), 22; Commerce Bk. v. Chambers, 14 Mo. App. 152; Pearce v. Langfit, 101 Pa. St. 507. Notice mailed two days after dishonor is usually too late; Sanderson v. Sanderson, 20 Fla. 292.

The cases differ as to what is a sufficient allegation in the pleadings to permit proof of "circumstances" as "notice;" Hall v. Davis, 41 Ga. 614; Kennon v. M'Rea, 7 Port. (Ala.) 175; Faulkner v. Faulkner, 73 Mo. 327; Martin v. Ewing, 2 Humph. 559; Norton v. Lewis, 2 Conn. 478; Moore v. Ayres, 5 S. & M. 310. But if partnership of drawer and drawee be the "circumstance," it must be alleged; Harwood v. Jarvis, 5 Sneed 375. In Texas and Iowa a stricter rule applies, and a specific allegation is necessary; Cole v. Wintercost, 12 Tex. 118; Lumbert v. Palmer, 29 Ia. 104.

Indemnity. — When a drawee assigns his property to or indemnifies an indorser, the indorser undertaking to provide for the bill, he is not entitled to notice as he has assumed a primary liability. The leading case on this point is Bond v. Farnham, 5 Mass. 170. The indorser received all the property of the maker of the notes for the purpose of taking care of the notes. He assumed a primary liability. See, also, Barton v. Baker, 1 S. & R. 334. It all turns on whether the circumstances are such as to imply that the indorser did assume a primary liability. If he receive all the property of the one originally primarily liable, or if he receive enough to pay the bill, the law will assume that he agreed to be primarily liable. If he gets all the maker has, he cannot then be injured by lack of notice; he could not do anything to protect himself further; but if he does not get all and the indemnity is only partial and there is no express

promise to take care of the bill, the law will be itale to imply such a promise: Durham v. Pri e, 5 Yerg, 200; Brunson v. Napier, I.Id. 199; Lettingwell v. Wlate, I. Johns, Cas. 99; Mond. v. Small, 2 Greenlant 207; Bank v. Griswold, 7 Wond, 165; Coddington v. Davis, 3 Den. 16, 26. Where the indorser hold goods for which the note was given as security for his indorsement, this was held not to dispense with notice to him; Holland r. Turner, 10 Conn. 308. There being no agreement to pay. But if fully indomnified it is held that no notice is necessary; Develing v. Ferris, 18 Ohio 170; Beard v. Westerman, 32 Ohio St. 29. Collateral security is not sufficient; he must be absolutely indomnified; Kramer r. Sandford, 4 W. & S. 328; Walters v. Munroe, 17 Md. 154, says, if absolutely indemnified before note falls due, no need of notice; but if not given until after he has been discharged for want of notice, an indemnity against general liabilities is not sufficient; Carlisle v. Hill, 16 Ala, 398. In any case to excuse want of notice the indemnity must be ample. Simply an assignment for all transactions unless ample is not sufficient; Van Norden v. Buckley, 5 Cal. 283; Bank v. McGuire, 23 Ohio St. 295. Where the maker indemnifies his indorser, and afterwards shows him the note saying he has paid it, and demanding and obtaining a release of the indemnity, if it has not been paid want of notice cannot be excused on the ground of indemnity; Bank v. Marston, 7 Ala. 108. If with full knowledge of all the facts an indorser accepts indemnity after discharge, it is persuasive evidence of his liability; Harding v. Waters, 6 B. J. Lea 324; Bank v. Govan, 10 Sm. & Mar. 333.

See generally on the subject of indemnity: Wilson v. Senier, 14 Wis. 380; Watt v. Mitchell, 6 How. (Miss.) 131; Walker v. Walker, 7 Ark. 542; Creamer v. Perry, 17 Pick. 332; Selby v. Buckley, 1 Kings Dig. (Tenn.) 261; Ireland v. Kip, Anth. N. P. (N. Y.) 195; Spencer v. Harvey, 17 Wend. 489; Bruce v. Lytle, 13 Barb. 163; Denny v. Palmer, 5 Ired. 610; Hayes v. Werner, 45 Conn. 246; Kyle v. Green, 14 Ohio 495; Walters v. Munroe, 17 Md. 154; Brandt v. Mickle, 28 Id. 436; Holman v. Whiting, 19 Ala. 703; Cockrill v. Hobson, 16 Id. 391. Where a surviving indorser took indemnity from the maker, and collected thereon nearly the whole amount, hold an admission by him that the proper steps had been taken to charge both indorsers; Willis v. Green, 5 Hill 232. In Geor-

gia by statute no demand or notice is required on notes unless they are to be negotiated at a chartered bank; Hoadley v. Bliss, 9 Ga. 303. The courts have extended this to include bills; Holmes v. McKenzie, 34 Ga. 558. See, also, Randolph v. Fleming, 59 Ga. 776; McLaren v. Bank, 52 Ga. 131; Gilbert v. Seymour, 44 Ga. 63.

The Texas statute permits immediate suit to excuse want of notice. It must be brought, if possible, at the next succeeding term. See Insall v. Robson, 16 Tex. 128. This statute of course applies only when it is necessary to excuse want of notice; Durrum v. Hendrick, 4 Tex. 495; Wood v. McMeans, 23 Id. 484; Platzer v. Norris, 38 Id. 1.

In Illinois by statute no notice is required in the case of promissory notes; Harding v. Dilly, 60 Ill. 528.

PASLEY v. FREEMAN.

TRINITY, 29 GEO. 3. -- IN THE KING'S BENCH.

[REPORTED 3 I. R. 51]

A false affirmation, made by the defendant with intent to defeated the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of decrit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

This was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "and whereas also the said Joseph Freeman, afterwards, to wit, on the 21st day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward, to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of 2634l. 16s. 1d., upon trust and credit; and did for that purpose there and then falsely, deceitfully, and fraudulently, assert and affirm to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully, cause and procure the said John Pasley and Edward to sell and deliver the said lastmentioned goods, wares, and merchandises, upon trust and

credit, to the said John Christopher; and in fact they the said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit, to the said John Christopher; whereas in truth and in fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of 2634l. 16s. 1d. last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but on the contrary the said John Christopher then was, and still is, wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation, the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid: to the damage," &c.

Application was first made for a new trial, which, after argument, was refused: and then this motion in arrest of judgment. Wood argued for the plaintiffs, and Russell for the defendant, in the last term: but as the court went so fully into this sub-

ject in giving their opinions, it is unnecessary to give the arguments at the bar.

The court took time to consider of this matter, and now delivered their opinions seriation.

Grose, J. I pon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant. And he is in no situation in which the law considers him in any trust or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood by saving that Falch might be safely entrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a talse affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was [the plaintiffs were] damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted, that the action is new in point of precedent: but it is insisted that the law recognises principles on which it may be supported. The principle on which it is contended to lie is, that wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert; and shall endeavour to show, that in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground, that there exists in this case, what the law deems damoum cum injuriâ. If it does, I admit that the action lies; and I admit that, upon the verdict found, the plaintiffs appear to have been damnified. But whether there has been injuria, a wrong, a tort for which an action lies, is matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie: but on looking into the old

books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true which is misrepresented: and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time, for a supposed injury which has been daily committed for centuries past; for I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others: and if such an action would have lain, there certainly has been and will be, a plentiful source of litigation of which the public are not hitherto aware. A variety of cases may be put: - Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss, upon any principle that will support this action? And yet such an action has never been attempted. Or, suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and surefooted, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller; and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been, if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an

injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound, in a case like the present, to tell the truth, the books supply me with a variety of cases in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts, in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is, where the affirmation is that the thing sold has not a defect which is a visible one: there the imposition, the fraudulent intent, is admitted, but it is no tort (a). The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion; such as the party deceived may exercise his own judgment upon; as where it is a matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; Bayley v. Merrel. In Harvey v. Young, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth 150%, to be sold, upon which J. D. gave 1501., and afterwards could not get more than 100l. for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Ro. Abr. 101, are recognised in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie — not even a dictum. But from the cases cited, some principles may be extracted to show that it cannot be sustained; 1st, That what is fraud, which will support an

⁽a) See Margetson v. Wright, 7 Bing. 605; 8 Bing. 457; 3 Bl. Comm. 166; Dyer v. Hargrave, 10 Ves. 507.

action, is matter of law; 2dly, That in every case of a fraudulent misrepresentation attended with damage, an action will not lie, even between contracting parties; 3dly, That if the assertion be a nude assertion, it is that sort of misrepresentation, the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit: but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own: to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in Yelverton respecting the value of the term. But at any rate it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this, the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of Bayley v. Merrel. I am therefore of opinion, that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

Buller, J. The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is, Whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended, that this was a bare naked lie, that, as no collusion with Falch is charged, it does not amount to a fraud: and, if there were any fraud,

the nature of it is not stated and it was supposed by the counsel who originally made the motion, that no action could be maintained, unless the defendant, who made this talse assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare maked he; but that I define to be, saving a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or decrive, another person. Every decrit comprehends a he; but a deced is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the inputy which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive held in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro, 196, and all other cases which relate to freehold intorests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are, Yelv. 20; Carth. 90; Salk, 210. The first of these has been fully stated by my brother Grose: but it is to be observed that the book does not affect to give the reasons on which the court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words warranty and affirmation, the case is not law: for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended (a). But the true ground of that determination was, that the assertion was of mere matter of judgment and opinion; of a matter which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment or opinion, in such case, implies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only; but I differ from him in that respect; for it is stated on this record, that the defendant knew that the fact was false. The case in Yelv. ad-

⁽a) See Power v. Barham, 4 Ad. & Ell. 473.

mits, that if there had been fraud, it would have been otherwise. The case of Crosse v. Gardner, Carth. 90, was upon an affirmation that oxen, which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was, that the declaration neither stated that the defendant deceitfully sold them, nor that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. Ex concessis, therefore, if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held, that affirming them to be his, knowing them to be a stranger's is the offence, and case of action. The case of Medina v. Stoughton (a), in the point of decision is the same as Crosse v. Gardner: but there is an obiter dictum of Holt, C. J., that, where the seller of a personal thing is out of possession, it is otherwise, for there may be room to question the seller's title, and caveat emptor in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case: and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion: and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorites against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion then is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment: but, if one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes

fraud, though there be no collusion, is further proved by the case of Risney v. Selby, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30l. per annum when it was only 20l. per annum, and the plaintiff had his judgment; for the value of the rent is a matter which hes in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And by the words of the books it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection, that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the dictum or inference which may be collected from that case. If A, by fraud and deceit cheat B. out of 1000/., it makes no difference to B. whether A., or any other person, pockets that 1000l. He has lost his money, and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority for him to sell them, and upon that B. buy them, when in truth they are the goods of another, yet if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of a stranger, yet B. shall have an action for this deceit. It is not clear from this case, whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that falsely and fraudulently are equivalent to knowingly. If the first were the fact in the case namely, that he had no authority - the case does not apply to this point; but if he had no authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll.

Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name, of my land, this shall bind me for ever; and therefore I may have a writ of deceit against him who acknowledged it; so if a man acknowledge a recognizance, statute-merchant, or staple. There is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, 1. 25, it is said, if my servant lease my land to another for years, reserving a rent to me, and to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances; if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty. Here then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425, but no notice is taken of this point; probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration, that if there were any fraud, the nature of it is not stated: to this the declaration itself is so direct an answer that the case admits of no other. The fraud is, that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here then is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for fraudulenter without sciens, or sciens without fraudulenter, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove

that it was false, and that the defendant knew it to be so; by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar, to show that mischiefs and inconveniences would arise if this action were sustained: for if a man, who is asked a question respecting another's responsibility, hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said, that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question, or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is, that he shall give no answer, or that if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of Copps v. Barnard, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books, which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In R. v. Gunston, 1 Str. 583, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornvcraft, whereby the prosecutor was induced to trust him; and the court refused

to grant a certiorari, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How indeed an indictment could be maintained for that I do not well understand; nor have I learnt what became of it (a). The objection to the indictment is, that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, I say ausis talibus istis non jura subserviunt.

Ashurst, J. The objection in this case, which is to the third count in the declaration is, that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies, notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in Bayley v. Merrel (b), is a sound and solid principle — namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power namely, by weighing the goods; and therefore it was a foolish credulity against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but non constat that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs: as if there had before this event subsisted a partnership between him and Falch, which had been dissolved: but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action; as in Risney v. Selby (c), which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not, unless where the party making

⁽a) The indictment, I suppose, must have been for conspiracy.

⁽b) 3 Bulst. 95.

⁽c) Salk. 211.

it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not besitate to say that it could not be law; for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act: for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said, that if this be determined to be law, any man may have an action brought against him for telling a lie by the crediting of which another happens eventually to be injured. But this consequence by no means follows: for in order to make it actionable, it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances, I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon, for the quo animo is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise

two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law-books one-fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of Coygs v. Barnard; for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And, indeed, the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred, may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore, I think the rule for arresting the judgment ought to be discharged.

Lord Kenyon, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties, though indeed it is not every moral and social duty the neglect of which is the ground of an action. For there are some, which are called in the civil law duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord C. B. Comyns (a), that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for this opinion; but his opinion alone is of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., that " fraud without damage, or damage without fraud, gives no cause of action: but where these two do occur, there an action lieth." It is true, as

⁽a) Com. Dig. Tit. "Action upon the case for a deceit." A. 1.

has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dudderidge, J., said, "If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence (a). And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held that the action was not maintainable. Then how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit, but by an application to his neighbours. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversations to know the title of an estate which he is about to purchase: but he may inspect the title deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the court seemed to consider that damnum and injuria are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken sub modo. If, indeed, no injury is occasioned by the lie it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, it is not actionable: but if she lose her marriage by it, then she may

⁽a) On this principle depends Priestley v. Fowler, 3 M. & W. 1.

recover satisfaction in damages. But in this case the two grounds of the action concur: here are both the damnum et injuria. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss, this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly "fraudulenter," did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable, on the grounds of deceit in the defendant and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

As to the effect produced by this celebrated decision on the operation of the Statute of Frauds, and by st. 9 G. 4, c. 14, sec. 6, upon the class of cases of which this is the leading one, see the note to Chandelor v. Lopus, ante, vol. i. It is shown in the same note from the cases of Foster v. Charles, 6 Bing. 396; 7 Bing. 108; Corbet v. Browne, 8 Bing. 133; and Polhill v. Walter, 3 B. & Ad. 122, that, in order to prove such fraud as will sustain this action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff; a point which had been much mooted in Haycraft v. Creasy, 2 East, 92; Taylor v. Ashton, 11 M. & W. 401. Crawshay v. Thompson, 4 M. & Gr. 387, Cressell, J., thus lays down the rule, "The cases may be considered to establish the principle, that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another." See also Keats v. The Earl of Cadogen, 10 C. B. 591 [Behn v. Kemble, 7 C. B. N. S. 260, and Evans v. Edmonds, 13 C. B. 777].

A singular case occurred some time ago in the Court of Exchequer, in which the majority of the judges decided that a contract made by an agent in behalf of his principal, and into which the contractee was induced to enter by a representation, which, though false within the knowledge of the principal, was not so within that of the agent, was not void on the ground of fraud; for it was argued there is no fraud in the agent, since he thought he was telling the truth, nor any in the principal, since he did not make the representation. Lord Abinger, C. B., thought, upon the other hand, that the contract being procured by misrepresentation must be tainted with legal if not moral fraud. The case was *Cornfoot* v. *Fowke*, 6 M. & W. 358, [and the facts were as follows:—The plaintiff (the owner of a ready-furnished house)

had employed an agent to let it for him, and the agent had let it to the defendant. The adjoining house was used as a brothel, and this fact was known to the plaintiff, but not to the agent. Before the agreement to take the house was signed by the defendant, he had asked the agent whether there was any objection to the house, and he had answered that there was not. The action was brought against the defendant for the non-performance of his agreement and he pleaded that he had been induced to enter into the contract by the fraud of the plaintiff.] This case is by no means universally admitted as law, and probably will be hereafter questioned. [See just p. 22]

Accordingly, few cases have excited more animated discussion; in the course of which the question seems to have been - Does legal without moral fraud or perhaps more accurately. May a misrepresentation be fraudulent in law so as to invalidate a control to ar farmach around of action, without moral fraud?]. In the case of Fuller v. Wilson, 3 Q. B. 58, which was an action on the case for a false representation, the facts were assumed to raise the question before referred to, and the Court of Queen's Benein in a considered judgment, differed from the view taken by the unifority of the Court of Exchequer, in the case of Cornfoot v. Fowke, adopting the opinion of the Chief Baron upon that question, "Lord Abinger maintained," says Lord Denman. C. J., delivering the judgment of the court, "and surely not without reason, that there was some moral fraud in the conduct of both, the principal concealing a fact which made his house utterly unfit for the purpose for which he was letting it; the agent stating a falsehood, which, of course he could not know to be true, even if he believed it; we do not, however, take this ground; we adopt the other proposition of the Chief Baron, namely, that whether there was meral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them." The facts of the case were afterwards by consent and leave of the court, stated in a special verdict, and the judgment was reversed in error, but on a different point; see the report 3 Q. B. 68 and 1009.

Meanwhile, the Court of Exchequer, in Moons v. Hoyworth, 10 M. & W. 147 Lord Abinger still dissentient, and in Toylor v. Ashton, 11 M. & W. 401, reiterated their previous opinion as delivered in Carafaat v. Fowke, whilst the Court of Queen's Bench, soon afterwards, in the case of Evans v. Collins, 5 Q. B. 804, adhered to their former judgment upon this question. That was an action on the case brought by the plaintiff, late Sheriff of London, against the defendants, attorneys for one Power, who had sued John Wright for a debt, and obtained execution against him, for falsely representing another John Wright , who was then in custody of the plaintiff), to be the defendant in that action, though they knew the contrary. By which false representation the plaintiff was induced to detain the wrong person, who thereupon brought an action against him, and therein recovered by way of compromise: 101., in respect of the unlawful imprisonment. To this declaration, Not Guilty was pleaded; and also, 3rdly, That the defendants had reasonable and probable cause to believe, and did believe the person whom they pointed out, to be the real defendant. Upon this third plea the defendants had a verdict, but the court held the allegation in the declaration of the knowledge of the defendants, as well as the issue upon the third plea, to be immaterial, and gave judgment for the plaintiff upon that issue, non obstante veredicto.

Upon a writ of error, however, the Exchequer Chamber (5 Q. B. 820) held the allegation of the scienter in the declaration and the issue on the third plea, to be material; and, distinguishing the case from that of Humphreys v. Pratt, 5 Bligh, N. S. 154 (upon the authority of which the judgment in the court below had partly proceeded), as being the case of a direction to a mandatory or agent and not a mere representation, reversed the decision of the Court of Queen's Bench. See also Shrewsbury v. Blount, 2 M. & G. 475. and Rawlings v. Bell, 1 C. B. 951, where the Court of Common Pleas held that injury caused by a statement false in fact, but not so to the knowledge of the party making it, or made with intent to deceive, would not support an action. In the case of Ormrod v. Huth, 14 M. & W. 651, the Exchequer Chamber again affirmed the same principle: and as the judges of the Queen's Bench were, it is apprehended, parties to this latter judgment, the question may now, perhaps, be considered as settled, especially as in the more recent case of Barley v. Walford, 15 L. J. Q. B. 369; 9 Q. B. 197, the Court of Queen's Bench acquiesce distinctly in the propriety of the doctrine, that moral fraud in a representation is essential, in order thereby to invalidate a contract, or furnish ground of action; so that the result of the recent elaborate discussion of this subject would seem to leave the law very much as it was settled by the principal case, and that of Haycraft v. Creasy, 2 East, 92, [accord. Childers v. Wooler, 2 E. & E. 287, a case very similar in its facts to Evans v. Collins.

The supposed distinction between legal and moral fraud has been the source of some confusion. There is no such thing as fraud into which some degree of moral obliquity does not enter. Accordingly (subject to what will appear hereafter as to the responsibility of an innocent principal for the fraud of his agent), an action of deceit will not lie for a perfectly innocent misrepresentation, for such a representation is not fraudulent. On the other hand, a very slight degree of moral obliquity may suffice to render a representation fraudulent in contemplation of law.] It is not necessary that it should be false to the knowledge of the party making it; if [it be] untrue in fact, and not believed to be true by the party making it, for made recklessly without any knowledge on the subject] and for [the purpose of inducing another person to act upon it, an action may be maintained thereon by the person who has been induced to act upon it. See the judgment in Taylor v. Ashton, 11 M. & W. 415 (where at the 7th line from the bottom of the page 415, the word "true" is printed for "untrue"). Jarrett v. Kennedy, 6 C. B. 319; [Evans v. Edmunds, 13 C. B. 777, per Maule, J.; Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 79, per Lord Cairns; Hart v. Swaine, 7 Ch. D. 42; Eaglesfield v. Lord Londonderry, 4 Ch. D. 693, and see note to Chandelor v. Lopus, ante, vol. i.] The purpose is essential, Thom v. Bigland, 8 Exch. 725; [Behn v. Kemble, 7 C. B. N. S. 260.

For some pointed observations on the impropriety of the expression legal fraud, see per Bramwell, L. J., Weir v. Bell, 3 Ex. D. 238. See also Joliffe v. Baker, 11 Q. B. D. 255; 52 L. J. Q. B. 609. Still, as those facts which the law regards as sufficient to support an action for deceit need not necessarily amount to what in popular language would be called fraud, the expression is a convenient one whereby to indicate the legal as distinguished from the popular notion of fraud.

As to what amounts to a misrepresentation, see Ward v. Hobbs, 3 Q. B. D. 150; 47 L. J. Q. B. 90, affirmed 4 App. Cas. 13; 48 L. J. Q. B. 281, where it was held that the fact of exposing pigs for sale in the open market by a per-

son who knew that they were affected with a contagious disease was not sufificient proof of a fraudulent representation.

The doctrine that moral fraud in a representation is necessary to invalidate a contract or furnish ground of action cannot at all be extended to those cases in which the representation expressly or implicitly forms part of the contract between the parties, as cases of insurance, or the like. See the judgment of Baron Parke, in Macas v. Ils growth, 10 M & W. 157.

As to averments of fraud in cases where it was not essential to the cause of action, see the judgment of Baron Parke in Ambrona v. The ratio, S.L. Sch. 428, and the judgment in Sociafen v. Lard Chelansford, 5 H. & N. 929, 921.

It will be observed that the above discussion does not involve the whole of the doctrine promulgated by the majority of the court in Cornust v. Forker so far as that doctrine draws a distinction between the knowledge of the principal and that of the agent, and requires that the fraud and the statement should be those of the same individual at is still doubted, and may give rise to future discussion | See Wilde v. Gibson, 1 H. of L. Cases, 605; Grant v. Norway, 10 C B, 665; Howard v. Tucker, I B & A, 712. See also The Vational Frehinge to of Glasgow v. Drew. 2 Macqueen, H. of L. C. 103, in which case some observations were made by the peers who took part in that decision which throw much light upon the principle of the referred v I will be upon the principle of the referred visit in the reservoir foot v. Fowke," said the Lord Chancellor (Lord Cranworth), "the plea was that the defendant had been induced to enter into the agreement sued on by the fraud and covin of the plaintiff. The evidence proved nothing to support that plea; for the plaintiff had merely put the house into the hands of an agent to be let at a stipulated rent. He had neither himself stated, nor authorised the agent to state, anything false or deceptive. The court held that the plea was not made out by evidence, which merely showed the agent to have stated (what he believed to be true), namely, that there was no objection attached to the house." And Lord St. Leonards, after referring to the distinction between fraud and misrepresentation, and stating that it was not denied in the judgment in Cornfoot v. Fowke, as he understood it, that the principal would have been responsible if he had employed an ignorant agent for the purpose of concealing a fact material to the value of the property, proceeded as follows: "But I should take the liberty of going a good deal further. I should say that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact was, that a man, knowing that there is so serious a muisance affecting a house as to diminish its value in such a way that no man of respectability could live in it, and he takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose is aware of the fact; and if in the course of the treaty for the contract, the agent being asked if such a fact existed, states positively no, and the contract is executed in silence upon the point, because the purchaser or the tenant's vigilance has been lulled to sleep upon it, and he believes the representation made to him by the agent. I say, in such a case as that, I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a person so availing himself of a misrepresentation of his own agent, who might be ignorant of the fact, although the principal himself knew it, and employed the agent in order to avoid making a direct representation to the contrary I should feel no hesitation, if I had myself to decide that case, in saying, that although the representation was not fraudulent - the agent not knowing that it was false - yet that, as it in fact was false, and false to the knowledge of the principal, it ought to vitiate the contract."

In Cornfoot v. Fowke the question discussed was, as we have seen, the effect of an innocent but untrue statement by an agent, when coupled with a knowledge on the part of the principal, which would clearly have been sufficient to support an action of deceit against him, had he himself made the statement complained of. In Udell v. Atherton, 7 H. & N. 172, the question arose as to the liability of innocent principals to an action of deceit for a false and fraudulent representation made by their agent as to the quality of an article sold by him, the principals having adopted the contract and received part of the price. The facts were shortly these. The defendants employed an agent to sell timber on commission. The agent sold to the plaintiff a log of timber, and fraudulently represented it to be sound, although he knew it to be defective. The buyer gave to the principals two bills of exchange for the price of the timber, one of which was paid; and afterwards the defect in the log was discovered. The buyer then complained to the principals, who stated, as was true, that they had neither authorised nor wished their agent to sell wood as sound which was defective; and they refused to make any allowance, and insisted on the payment of the whole price. Under these circumstances the judges of the Court of Exchequer differed as to whether the principals were liable in an action of deceit. The true rule was, however, it is apprehended, laid down by Sir James (then Baron) Wilde, who held that the action would lie on the ground that the principals, having adopted the sale made by the agent and received the price, were responsible for the fraud committed by the agent in making the contract, by which fraud alone the contract was obtained; and that consequently the false affirmation by the agent might be treated as a false affirmation made by the principals themselves. The authorities in support of this view, which are numerous, but not very direct, are collected in Baron Wilde's judgment, which will repay a perusal.

In Barwick v. The English Joint Stock Bank, L. R. 2 Ex. 259, Willes, J., in delivering the judgment of the Exchequer Chamber, distinguished the opinions of Martin and Bramwell, BB., in Udell v. Atherton, on the ground that in that case the agent was not the general agent of the defendants, and that his act had been adopted under peculiar circumstances, and laid it down that for false representations made by an agent in the ordinary course of his employment for his master's benefit, the principal is responsible, in the same manner as he is for any other wrong committed by a servant. In the same case the same learned judge is reported to have said, "I should be sorry to have it supposed that Cornfoot v. Fowke turned upon anything but a point of pleading." See also Swift v. Winterbotham, L. R. 8 Q. B. 244; Id. v. Jewsbury, L. R. 9 Q. B. 308, 43 L. J. Q. B. 56; Newlands v. National Employers Accident Association, 54 L. J. Q. B. 428; and Mackay v. The Commercial Bank of New Brunswick, L. R. 5 P. C. 394, where Barwick v. The English Joint Stock Bank, was approved and followed, and the dicta of Lords Cranworth and Chelmsford in the case of Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145, were explained and distinguished. And see Blake v. Albion Life Assurance Co., 4 C. P. D. 94; 48 L. J. Q. B. 169, and per Lord Selborne, Houldsworth v. City of Glasgow Bank, 5 App. Ca. at p. 326; and the dicta of Lord Esher, M. R., in Blackburn v. Vigors, 17 Q. B. D. at p. 559.

In Weir v. Bell, 3 Ex. D. 238, which was an appeal from the decision of the Ex. D. in Weir v. Barnett, 3 Ex. D. 32, Bramwell, L. J., impugns the ground on which the judgment of the Ex. Cham. was rested in Barwick v. English Joint Stock Bank, pointing out that fraud is essentially a wilful act,

and that, as a general rule, a master is not responsible for the wilful act of his servant. The learned Lord Justice suggests that the true principle upon which a person who has committed no fraud himself, may be held responsible for the fraud of his agent is, that he impliedly contracts that his agent will not be guilty of fraud - 1f, however, the principle of Brown k v. The Landish Joint Stock Bank be confined, as it expressly was in that case, to acts done by the agent or servant strictly within the scope of his employment, it seems scarcely open to the reflections cast upon it. Scope of employment has undoubtedly received, in many cases, an interpretation wide enough to embrace within it acts done without or even in direct violation of the master's order: see Betts v. de Vitre, L. R. 3 Ch. 429; Mackag v. Commercial Br Cof New Branswick, supra, at p 411, of L. R; and if such be the law, it would seem, with deference, no more unreasonable to hold the principal responsible on the ordinary rule of respondent superior for the frauds of his agent committed within the scope of his authority, than to resort to the fiction of a contract which is not made in fact. The rule laid down in Barwick v. Eaglish Joint Stock Bank, has been approved and acted upon in many subsequent cases. See the cases above cited, and Swire v. Francis, 3 App. Cas. 106; Show v. Port Philip, &c., Co., 13 Q. B. D. 103, per Mathew, J. In Wear v. Bell, it was held by the Court of Appeal, Cotton, L. J., dissenting (affirming the decision of the court below), that the defendant, a director, was not responsible for false and fraudulent statements, inserted without his knowledge, and from which he personally derived no benefit, in a prospectus, prepared by brokers, inviting subscriptions for debentures of the company. The company had, by resolution, authorised the directors to raise money by the issue of debentures, and the directors had thereupon instructed brokers to place the debentures. The court below and the majority of the Court of Appeal, held that the directors were themselves merely agents of the company in instructing the brokers, and did not stand to the latter in the relation of principals, so as to render themselves responsible without actual fraud.

Cotton, L. J., was, however, of opinion that the directors who employed the brokers were personally responsible for their fraudulent misstatements. See also Cargill v. Boxer, 10 Ch. D. 502; 47 L. J. Ch. 649; Mullens v. Miller, 22 Ch. D. 194; 52 L. J. Ch. 380.

An agent, acting within the scope of his authority, is not personally liable for an innocent misrepresentation, *Eaglesfield v. Marquis of Londonderry*, H. L. 26 W. R. 540.]

As to the effect of fraudulent representations made by members of public companies, in order to induce parties to become subscribers, see Wontner v. Shairp, 4 C. B. 404; Watson v. The Earl of Charlemont, 12 Q. B. 856; Gerhard v. Rates, 2 E. & B. 466; [Bayshaw v. Seymour, 18 C. B. 903; Bedford v. Bayshaw, 4 H. & N. 538; Scott v. Dixon, 29 Law J., Exch. 62, note; The National Eschange Co. of Glasgow v. Drew, 2 Macqueen, H. of L. Cases, 103; The New Brunswick and Canada Rail, Co. v. Congheave, 9 H. of L. C. 711; Peck v. Gurney, L. R. 6 H. L. 377; 43 L. J. Ch. 19 coverruling Bayshaw v. Seymour and Bedford v. Bayshaw, supra), where the cases on this subject are collected; Weir v. Barnett, supra; Smith v. Chadwick, 9 App. Cas. 187; Edgington v. Fitzmaurice, 29 Ch. D. 459.] And as to fraudulent suppression for the same purpose, Jarrett v. Kennedy, 6 C. B. 319; [Peck v. Gurney, supra; Craig v. Phillips, 3 Ch. D. 722; Eaglegield v. Marquis of Londonderry, 4 Ch. D. C. A. 693; H. L. 26 W. R. 540; Weir v. Barnett, supra; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218; Arkwright v. Newbold, 17

Ch. D. 301; 50 L. J. Ch. 372. As to what amounts to a fraudulent suppression under s. 38 of the Companies Act, 1867, see *Gover's case*, 1 Ch. D. 182; *Twycross* v. *Grant*, 2 C. P. D. 469, and cases therein cited; *Sullivan* v. *Mitcalf*, 5 C. P. D. 455.

A person who has been induced to take shares in a company through the fraud of its agents cannot, while retaining the shares, sue the company of which he is himself a member for damages, his only remedy is rescission; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.]

In Pontifex v. Bignold, 3 M. & G. 63, [it was held that] an action [was well brought] against an insurance company for misrepresentations as to the mode in which their business was conducted, by which the plaintiff had been induced to insure. ['It is well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly: it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff as one of the public acts on it, and suffers damage thereby." Swift v. Winterbotham, L. R. 8 Q. B. 253, cited in Richardson v. Silvester, L. R. 9 Q. B. 34.]

As to representations made by creditors to sureties, whereby they are induced to become such, or the extent of their liability is, or might be, increased, see *Stone* v. *Compton*, 5 N. C. 142; *Railton* v. *Matthews*, Dom. Proc. 10 Cl. & Fin. 934; *Hamilton* v. *Watson*, Dom. Proc. 12 Cl. & Fin. 109.

An action on the case is maintainable by the manufacturer of goods against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, with the intention of making them pass for goods manufactured by him; and this although there is no proof of special damage; Rodgers v. Nowill, 5 C. B. 109; [Farina v. Silverlock, 6 De G. M. & G. 214; 4 Kay & J. 650; and Dixon v. Fawcus, 30 Law J., Q. B. 137; Wotherspoon v. Currie, L. R. 5 H. L. 508; Metzler v. Wood, 8 Ch. D. 606; 47 L. J. Ch. 625. And see the 25 & 26 Vict. c. 88, "An Act to amend the law relating to the fraudulent marking of merchandise." as to the statutory remedies which exist in these cases; see also 46 & 47 Vict. c. 57.]

The expression of opinion by the court in the principal case, that the novelty of the action is no objection, the injury being clearly shown to exist, is cited in the note to Ashby v. White, ante, vol. i.

In the case of Langridge v. Levy, 2 M. & W. 519 [S. C. in error, 4 M. & W. 337], the Court of Exchequer carried the principle of Pasley v. Freeman somewhat further. It was an action for falsely and fraudulently warranting a gun to have been made by Nock, and to be a good, safe, and secure gun, and selling it as such to the plaintiff's father, for the use of himself and sons; one of whom (the plaintiff') confiding in the warranty, used the gun, whereupon it burst, and injured him. The action was held to be maintainable. "If," says Parke, B., delivering judgment, "it (the gun) had been delivered by the defendant to the plaintiff for the purpose of being used by him, with an accompanying representation to him, that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted on the faith of its being true, and had received damage thereby; then there is no question but that an action would have lain, on the principle of a numerous class of cases, of which the leading one is Pasley v. Freeman; which principle is, that a mere naked falsehood is not enough

to give a right of action; but that it is so if it be a falsehood told with the intention that it should be acted on by the party injured, and that act must produce damage to him. It, instead of being delivered to the plaintiff image dust by, the instrument had been placed in the hands of a third purson, to the purpose of being delivered to, and then esol by the plaintiff the like talse topresentation being knowingly made to the intermediate person to be communicated to the plaintiff and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the decent; nor can it make any difference that the third person also was intended by the defendant to be deceived; nor does there s em to be any substantial distinction if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. This is a false representation made by the defendant, with a view that the planning should use the instrument in adjugators of a and unless the representation had been made, the dangerous act would never have been done."

This is a remarkable case; it affords an instance in which a party may bring an action for the consequences of a breach of contract, who was not the contractee, and could not have sued upon the contract. It has been approved and acted upon in Pilmore v. Hood, 5 Bing. N. C. 97, and is said to have proceeded upon the ground of the knowledge and frond of the detendant, per Alderson, B., in Winterbottom v. Wright, 10 M. & W. 109. In that case A. built a coach for the Postmaster-General, B. horsed it, and hired C. as a coachman to drive it. The coach broke down from a defect in the building, for which, however, it was held that C. could not sue A.

The authority of Longerity v. Long has also been recognised in the case of Longweid v. Holliday, 6 Exch. 761; there the plaintiffs wife had purchased of the defendant a lamp for the purpose of its being used by herself and her husband: the defendant was not a manufacturer of lamps himself, but caused the lamps, of which the lamp in question was one, to be put together by other persons for him, from parts purchased of third parties; the lamp was defective, and upon the plaintiffs wife attempting to use it, exploded and seriously injured her. The action was brought by the plaintiff and his wife jointly to recover compensation for the injury. There was no proof at the trial that the defendant knew of the defects in the lamp, and the jury found that he sold the lamp in good faith, without any fraudulent or deceitful representation; it was held that the action was not maintainable, there being no fraud or any misfeasance towards the wife independently of the contract. See also Gerhard v. Bates, 2 E. & B. 476.

[In Blakemore v. The Bristol and Exeter Railway Co., 8 E. & B. 1035, a crane had been placed on the premises of the company for the purpose of enabling the owners of goods to unload them; a consignee of goods having been required by the company to remove them, proceeded to raise the goods with the crane, assisted by his servants and the servants of the company. B., who was the servant neither of the consignee nor of the company, was also asked by the consignee to assist in raising the goods; he did so, and during the operation, the crane, which was defective to the knowledge of the company, broke, and B. was killed. It was held that the company was not liable to B.'s administratrix in respect of the accident, for although the lender of goods for the purpose of user is responsible to the borrower in respect of defects in the chattel, with reference to the use for which he knows that the loan is accepted, and of which he is aware, he is not respon-

sible to a mere stranger who is in no way privy to the contract of loan. In this case the court observed that it had always been considered that Levy v. Langridge was a case not to be extended in its application; and that if in that case a friend of the father or sons, by their permission, had used the gun and sustained the accident, no action could have been maintained by him. See, where the consignee himself was injured while assisting the servants of the company, Wright v. London and North Western Railway Co., 1 Q. B. D. 252, 45 L. J. Q. B. 570.

In George v. Skivington, L. R. 5 Ex. 1, which was decided upon demurrer, the action was by husband and wife; the declaration stated that the defendant was a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to the defendant, which he represented to be fit and proper to be used for washing the hair without injury to the person using it, and to have been carefully and skilfully compounded by himself; that the defendant sold a bottle to the husband to be used by the wife as a hair-wash as the defendant knew, and upon the terms that the same was fit to be used by her without injury, and had been skilfully and carefully compounded by the defendant. Yet the defendant had so negligently and improperly conducted himself, &c., that by the mere negligence, &c., of the defendant, the said compound could not be used without personal injury, whereby the wife in using the same was injured.

It was objected on the part of the defendant that the injury to the wife being the cause of action, the declaration disclosed no facts which cast upon the defendant a legal duty towards her, and it was attempted to distinguish the case of Langridge v. Levy on the ground that in the present case there was no averment that the defendant knew that the compound was deleterious. The court held that the declaration disclosed a good cause of action on the ground that the duty of the vendor towards the purchaser to use ordinary care in compounding the wash extended to the person for whose use the vendor knew the compound was purchased. Cleasby, B., is reported to have said "substitute negligence for fraud and the analogy between Langridge v. Levy, and this case is complete."

It is a little difficult to extract from the judgments the precise principle upon which this case was decided, but it is submitted that it may be supported, if at all, upon the analogy of those cases cited by Parke, B., in the judgment in Longmeid v. Holliday, in which persons not parties to contracts may sue for the damage sustained if they be broken: cases in which a wrong has been done to a person for which he would have had a remedy although no such contract had been made, as, for instance, where an apothecary who has supplied improper medicines, or a surgeon who has unskilfully treated a patient, has been held liable to him for misfeasance, although the father or friend of the patient may have been the contracting party. See Pippin v. Shepherd, 11 Price 400; Gladwell v. Steggall, 5 Bing. N. C. 733; Foulkes v. Metropolitan District Railway Co., 5 C. P. D. 157, and compare Marshall v. York, Newcastle, and Berwick Railway Co., 11 C. B. 655, 21 L. J. C. P. 34. The dictum of Cleasby, B., however applicable to the facts of the case under discussion, must, it is apprehended, be taken as strictly limited to them, since it would be difficult to reconcile with Longmeid v. Holliday, the doctrine that the mere omission to use ordinary care in the manufacture of a chattel could, in the absence of fraud or knowledge of the defect, render the vendor liable to third persons not parties to the contract, although he was aware that the chattel was designed for their use; see Winterbottom v.

Wright, sup., Longmoid v. Holliday, sup., and mere negligence and fraud cannot consistently with those decisions be treated as convertible terms in such cases.

For a case showing what degree of connection it is necessary to establish between the negligent person and the person injured, see Collis v. Selden, L. R. 3 C. P. 495, with which case compare Parry v. Smith, 4 C. P. D. 325.

Since the last edition of this work, the principle involved in these cases was again much discussed in the recent case of Heaven v. Pender, 9 Q. B. D. 302; 11 Q. B. D. 503; 52 L. J. Q. B. 702. In that case the plaintiff, a painter. met with an accident through the defective condition of the ropes supporting a stage upon which he was standing while painting a ship lying in dock. The stage was supplied by the dock owner under a contract with the shipowner, by whom the plaintiff was employed. There was evidence that the defendant had not taken reasonable care as to the condition of the ropes at the time when he supplied the stage. Judgment having been given for the plaintiff in the county court, the divisional court Field and Cave, JJ set it aside, and gave judgment for the defendant, holding that on the facts there was no relation of contract or duty between the plaintiff and the defendant, who had not, as in Langridge v. Levy, been guilty of fraud or of a breach of duty to tell the truth, and who did not come under the rule as to persons who invite others to use their property, inasmuch as he had ceased to have any control over the stage after he parted with it to the shipowner. They treated George v. Skirington as in point, but as inconsistent with Winterbottom y, Wright and Longment y, Holliday, which latter cases they preferred to follow. This decision was reversed on appeal, but with a difference of opinion among the Lords Justices. Brett, M. R., after an elaborate examination of the authorities, in which he treats George v. Skivington, as well decided, deduces from them the following proposition, which he lays down as covering and reconciling them all "that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid danger." He was, however, further of opinion that the case fell within the narrower proposition, which affirms the duty of the inviter towards the person invited to take reasonable care. Cotton, L. J., in a judgment in which Bowen, L. J., concurred, declined to adopt the larger proposition above set out, instancing Langridge v. Levy, Blakemore v. Bristol and Exeter Rail. Co., Collis v. Selden, and Longmeid v. Holliden, as cases in which it was impliedly negatived. He held, however, that when ships were received into dock for repair, and provided with stages for the work on them which was to be executed there, all those who came to such ships for the purpose of painting and otherwise repairing them, were there for business in which the dock owner was interested, and must be considered as invited by the dock owner to use the dock and all appliances provided by him as incident to the use of the dock. That he would not be responsible for defects arising through the neglect of those who took the control of the stage after he parted with it, but that in the case before them the defect which caused the accident existed at the time when the stage was provided by the dock owner. (See also Elliott v. Hall, 15 Q. B. D. 315; 54 L. J. Q. B. 518.) In dealing with George v. Skivington, Cotton, L. J., expresses no disagreement with the divisional courts; on the contrary, he says it seems to support the general proposition which he denies to be law, and that Cleasby, B., had for the purposes of that action treated the negligence of the defendant as equivalent to fraud, which he regarded as the ground upon which Langridge v. Levy was decided.

The general rule that a person who is no party to a contract cannot sue in respect of damage resulting to him from the breach of it is well illustrated by the case of Alton v. The Midland Railway Company, 19 C. B. N. S. 213, where a master sued a railway company for neglect of duty in carrying his servant, whereby the latter was injured, and the master lost the benefit of his services. The court however held that the injury had resulted from a breach of duty arising out of a contract, that the mode of declaring could not affect the liability of the defendants, and that the master, being no party to the contract, could not sue in respect of damage caused by a breach of it. See further Goslin v. Agricultural Hall Co., 1 C. P. D. 482; Cattle v. Stockton Waterworks, L. R. 10 Q. B. 453.

Where, however, the defendant, a gasfitter employed by the plaintiff's master, left his work in such a condition as to be dangerous to a person approaching it with reasonable caution, the plaintiff, having been injured while so approaching it, was held entitled to recover. In this case there was a duty upon the gasfitter, wholly independent of contract, to take proper precautions to prevent a thing dangerous in itself from causing damage to any person lawfully approaching it. Parry v. Smith, 4 C. P. D. 325.

The rules deducible from *Langridge* v. *Levy* as to liability for representations are elaborately discussed by Wood, V.-C., in his judgment in *Barry* v. *Croskey*, 2 J. & H. 18–23, cited with approval by Lord Cairns in *Peek* v. *Gurney*, L. R. 6 H. L. 412.]

General acceptance of the principal case in the United States.

- The action to recover for a fraudulent representation of another's solvency is but an instance of the action for deceit. Where all the necessary elements concur, it is now generally recognized that the action will lie notwithstanding the objections which were urged against it. In the majority of cases the question of the defendant's liability for a fraudulent misrepresentation has not been raised, but it has been assumed that he is liable provided the necessary elements concur. The cases are numerous, however, in which the question whether the action will lie has been discussed. In Upton v. Vail, 6 Johns. 181, the defendant, who had a judgment bond against one Brown, and knew him to be worthless, nevertheless recommended him to plaintiff as being "as good as any man in the county" for the price of the goods plaintiff was to sell him. After plaintiff had made the sale, the defendant entered judgment, and under execution levied on the goods sold to Brown by plaintiff. Kent, Ch. J., delivered the opinion of the court, in which he said: "We have never expressly decided in this court that the action would lie. . . . The case of Pasley v. Freeman, decided in the K. B. so late as the year 1789 . . . is the first direct authority, in the English courts, in support of the action. I have carefully examined the reasoning of the judges in that case, and in the subsequent cases, which go to question or support the soundness of that accision; and I profess my approbation of the doctrine on which it was decided. The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." And again: "But independent of the English cases, I place my opinion upon the broad doctrine that fraud and damage coupled together will sustain an action. This is a principle of universal law" In Connecticut the cases of Wise r. Wilcox, 1 Day 22, and Hart r. Tallmadge, 2 Day 381, follow Pasley v. Freeman. In Kidney v. Stoddard, 7 Met. 252, it was said that: "From the time of the judgment in the great case of Pasley v. Freeman to the present day, through the long line of decisions both in England and America, the principle of that case, though with some statute modifications, remains unshaken and unimpaired." And the question was discussed and the English cases followed in Vermont in Ewins r. Calhoun, 7 Vt. 79, and Weeks r. Burton, 7 Vt. 67; and in Pennsylvania in Boyd's Executors v. Browne, 6 Pa. St. 310. Decisions in other states will be found in Endsley r. Johns, 120 III, 469; McKown v. Furgason, 47 Ia. 636; Chisolm v. Gadsden, 1 Strob. 220.

What must be proved to maintain the action. — In Busterud r. Farrington, 36 Minn. 320, the essentials of the action for deceit were laid down: "An action for deceit lies against one who makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person acting with reasonable prudence is thereby deceived and induced to so do, or refrain, to his damage."

The representation must be false when made. — Unless the statement be false, no action will lie; and the question of the truth or falsity of the representation must be determined by the facts as they were when the representation was made. A change in

the condition of affairs, subsequent to the time of making the representation, cannot affect the liability of the person making it; Corbett v. Gilbert, 24 Ga. 454. And it seems the defendant is liable for a fraudulent misrepresentation, even when at the time the plaintiff acted in reliance on the representation, the statement was true, if it was false when made; Reeve v. Dennett, 145 Mass. 23, 30.

Falsity may consist in suppression of the truth, or the assertion of a falsehood. — The false representation may consist in the suppression of the truth, as well as in the assertion of a falsehood; Allen v. Addington, 7 Wend. 9. In Kidney v. Stoddard, 7 Met. 252, the defendant had concealed the fact that the person he recommended was a minor. The judge instructed the jury that when a party intentionally conceals a material fact, in giving a letter of recommendation, it amounted to a false representation. On motion for a new trial the charge was held to be correct. See, also, Tryon v. Whitmarsh, 1 Met. 1; Boyd's Executors v. Browne, 6 Penn. St. 310; Decker v. Hardin, 5 N. J. 579; Bokee v. Walker, 14 Penn. St. 139; Chisolm v. Gadsden, 1 Strob. 220; Rheem v. Naugatuck Wheel Co., 33 Penn. St. 358. In Chisolm v. Gadsden, it was held that a misrepresentation need not consist in words "but that on the contrary, such a fraud as sustains the action in question may grow out of deeds as well as words." Lobdell v. Baker, 1 Met. 193. But while one can commit a fraud by mere silence, a deception implies some act or language.

The representation must be of a fact.—The representation must be of a fact; Buschman v. Codd, 52 Md. 202; Ins. Co. v. Reed, 33 Ohio St. 283; and the cases lay down very generally that an opinion is not a fact within the meaning of the law. It is said, "If any one relies on mere opinion instead of ascertaining facts, it is his own folly;" Sieveking v. Litzler, 31 Ind. 13; Fulton v. Hood, 34 Pa. St. 365; Tuck v. Downing, 76 Ill. 71; Crown v. Carriger, 66 Ala. 590; Starr v. Bennett, 5 Hill 303; Belcher v. Costello, 122 Mass. 189; Buschman v. Codd, 52 Md. 202; Gordon v. Butler, 105 U. S. 553. It is probably safe to say, however, that as the rule is generally stated, it rests on no logical basis, and does not represent the law. The state of one's mind on a subject capable of positive knowledge, or in regard to one on which only an opinion can be entertained; and the state of the

defendant's mind in reference to his belief in the truth of the statement made by him, as will appear below, is the test of his liability. As regards the form of the statement, it is obviously immaterial whether the defendant says: "Such is my opinion;" or, "such is the fact." In either case the speaker is understood to be expressing his opinion merely, and the statement that a fraudulent misrepresentation of an opinion creates no liability, has no reference to the form of the words, but only to the subject-matter. The rule is supposed to apply to eases in which a statement is made, regarding the truth of which the person making it can have no absolute knowledge. In this class of cases the defendant must state his belief truthfully, or he is liable if damage ensue to the plaintiff. A different rule applies to statements made by persons who are about to contract with each other. The consideration of the reason for this exception must, for the present, be deferred. But it is the class of cases just mentioned which has given rise to the erroneous idea, that a liability can not be created by a trandulent misstatement of a matter of opinion. The cases generally arise between vendor and vendee, where the vendor has overestimated the value of his property; the reason given for exempting the vendor from responsibility for his misstatements, viz., that the value of property is a matter of opinion, and hence no action will lie, is shown to be wrong by the fact that an action will lie against a defendant, not a party to the contract, who expresses a fraudulent opinion as to the value; Medbury v. Watson, 6 Met. 246; Busterud v. Farrington, 36 Minn. 320. The same idea seems to have been in the mind of Mr. Justice Field in Gordon v. Butler, 105 U.S. 553, where the defendants had given a certificate of the value of certain quarries. The case of Pasley r. Freeman is high authority for the view that a statement of opinion as well as of fact, renders the defendant liable for a fraudulent misrepresentation. A representation of another's solvency must in the nature of things be an expression of opinion, and it was so held in Belcher v. Costello, 122 Mass. 189, where the judge says: "The representation proved, as stated in the bill of receptions, was that the parties were good. This, taken by itself, is not the statement of a fact, but the expression of an opinion merely; "Marsh v. Falker, 40 N. Y. 562; Doty v. Campbell, 1 How. Pr. N. S. 101. The same view was taken in Savage v. Jackson, 19 Ga. 305, though it was erroneously supposed that

that view was inconsistent with the correctness of Pasley v. Freeman. See, also, Lyons v. Briggs, 14 R. I. 222; Jude v. Woodburn, 27 Vt. 415. The conclusion to be drawn from the cases is that the defendant's "opinion" is to be regarded as a fact, for fraudulently misrepresenting which he incurs a liability. See, also, Hubbell v. Meigs, 50 N. Y. 480, 489; Hickey v. Morrell, 102 N. Y. 454, 463.

A promise is not a representation.—A promise or expression of intention is not a representation, and the person making it cannot be held liable as for a deceit, even though he had no intention of living up to it. Thus where the declaration alleged that the defendant expressed a willingness to endorse the note of another, if the plaintiff would sell him a quantity of cotton, in reliance on which representation plaintiff sold the cotton; that defendant was not willing and did not intend to indorse the note; and that by reason thereof the plaintiffs were damaged, it was held that there was no ground for an action for a deceitful representation; Gallager v. Brunel, 6 Cow. 346; Gage v. Lewis, 68 Ill. 604; Lexow v. Julian, 21 Hun 577; Fenwick v. Grimes, 5 Cranch C. C. 439; Farrar v. Bridges, 3 Humph. 566; Long v. Woodman, 58 Me. 49; Burt v. Bowles, 69 Ind. 1; Sieveking v. Litzler, 31 Ind. 13.

Representation of law.—A misrepresentation as to the law applicable to a given state of facts cannot be made the basis of an action for deceit; Starr v. Bennett, 5 Hill 303. The reason given for this is, that as the law is presumed to be equally well known to all, no one has a right to rely on the opinion of another respecting it; Townsend v. Cowles, 31 Ala. 428; Steamboat Belfast v. Boon, 41 Ala. 50; Clem v. Newcastle & Danville R. R. Co., 9 Ind. 488; Russell v. Branham, 8 Blackf. 277; Ins. Co. v. Reed, 33 Ohio St. 283; Fish v. Cleland, 33 Ill. 238; Lehman v. Shackleford, 50 Ala. 437; Reed v. Sidener, 32 Ind. 373; Lexow v. Julian, 21 Hun 577; Burt v. Bowles, 69 Ind. 1; Gormely v. Gymnastic Association, 55 Wis. 350; People v. Supervisors of S. F., 27 Cal. 655; Jaggar v. Winslow, 30 Minn. 263; Upton v. Tribilcock, 91 U. S. 45. But see Abbott v. Treat, 78 Me. 121, 126.

The representation must be of a material fact.—A misrepresentation to be actionable must be of a material fact; Schwabacker v. Riddle, 99 Ill. 343; Jordan v. Pickett, 78 Ala. 331; Hall v. Johnson, 41 Mich. 286. "If false and fraudulent rep-

resentations be alleged as the groundwork for avoiding a bargain, it must be shown that, like poison, it entered into, and mixing with, the vital essence of it, tainted and destroyed it; "Clark v. Everhart, 63 Penn. St. 347. Still a party who has effected his purpose through a misrepresentation cannot ordinarily deny its materiality, and it will be considered enough if it might have had a substantial effect, as one of several inducements. It need not have been the sole inducement; James v. Hodsden, 47 Vt. 127; Jordan v. Pickett, supro; Addington v. Allen, 11 Wend. 374; Safford v. Grout, 120 Mass. 20; Hale v. Philbrick, 47 Ia, 217; Fishback v. Miller, 15 Nev. 428; Winter v. Bandel, 30 Ark. 362; Lebby v. Ahrens, 26 S. C. 275. But see Newsom v. Jackson, 26 Ga, 248.

Must be fraudulent as well as false. To render the defendant liable, the representation must be not only false, but fraudulent. A mere mistake will not impose any liability upon him. It is well settled in this country, that as far as the class of cases under consideration is concerned, the defendant must have been guilty of a moral wrong to render him hable; Cowley c. Smyth, 46 N. J. L. 380. If the defendant states what he knows to be untrue, or makes a positive representation as of his own knowledge, when he knows nothing whatever about the matter, he is guilty of a deceit if the statement be untrue; McKown v. Furgason, 47 Ia. 636. The moral element in the second class of cases is to be found in the implied assertion that the person making it has some knowledge about the matter, when in reality he has not. In many of the cases an "intent to deceive" or "to defraud" is said to be necessary. This does not mean that the defendant must have intended to injure the plaintiff. From the very fact that one makes a misstatement knowingly, and intending that it shall be acted on, an intent to deceive or to defraud is inferred; Cowley v. Smyth, 46 N. J. L. 380; Hudnut v. Gardner, 59 Mich. 341; Endsley v. Johns, 120 III. 469. The rule is necessarily different where the deceit is alleged to consist in a suppression of the truth. The failure to state all the facts knowingly does not render the defendant liable, unless made with a view to deceive the person relying on his representation; Bokee v. Walker, 14 Pa. St. 139.

Statements known to be false. — In Lord v. Goddard, 13 How. 198, the court say: "The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an inten-

tion to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue." To the same effect, Marsh v. Falker, 40 N. Y. 562; Stitt v. Little, 63 N. Y. 427; Avery v. Chapman, 62 Ia. 144; Sims v. Eiland, 57 Miss. 83; Holdom v. Ayer, 110 Ill. 448; Graham v. Hollinger, 46 Pa. St. 55. In this last case the court say: "Guilty knowledge and an intent to deceive were essential to the plaintiff's recovery;" Huber v. Wilson, 23 Pa. St. 178; Tucker v. White, 125 Mass. 344; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Terrell v. Bennet, 18 Ga. 404; Crown v. Brown, 30 Vt. 707; Zabriskie v. Smith, 13 N. Y. 322; Sollund v. Johnson, 27 Minn. 455; Schwabacker v. Riddle, 99 Ill. 343.

Reckless statements. — Representations made in ignorance of their truth or falsity involve moral turpitude equally with knowingly false statements. "If the party made the representation not knowing whether it was true or false, he cannot be considered as innocent; since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning the fact. Hence, if a party had no knowledge, he has asserted for true what he knew to be false;" Ins. Co. v. Reed, 33 Ohio St. 283, citing Bigelow on Fraud, 61; Stone v. Covell, 29 Mich. 359; Woodruff v. Garner, 27 Ind. 4; Fisher v. Mellen, 103 Mass. 503; Foard v. McComb, 12 Bush 723; Nugent v. C. H. & I. Street R. R. Co., 2 Disn. (Ohio) 302. This is the rule laid down in Hartford Ins. Co. v. Matthews, 102 Mass. 221; Beebe v. Knapp, 28 Mich. 53, 76; Duff v. Williams, 85 Penn. St. 490; Einstein v. Marshall, 58 Ala. 153. The language used by the court in Tucker v. White, 125 Mass. 344, goes even further, and would seem to make one asserting a fact as of his own knowledge responsible absolutely for the correctness of his statement. But this is not a correct exposition of the law, unless the person making the representation has no reason whatever for his belief on the subject.

No liability for rash or indiscreet statements.—If he has some reason to believe he knows the facts to be as he states them, he is not to be held liable simply for being rash or indiscreet; Young v. Covell, 8 Johns. 23; and whether he had sufficient reason for his belief is not a proper matter of inquiry so long as there was some foundation for the belief.

It is not necessary that there should be reasonable grounds for the belief expressed. - In Dilworth v. Bradner, Mr. Justice Sharswood, in discussing the question, says: "It would introduce a new and very dangerous element into the question to say that the jury must decide whether the defendant had reasonable grounds for his belief." Of course, the facts may be so strong that the defendant could hardly have been mistaken, but that question is for the jury. See Graham v. Hollinger, 46 Penn. St. 55; McKown v. Furgason, 47 Ia. 636. But see Sims v. Eiland, 57 Miss. 607, semble contra. In Lord v. Goddard, 13 How. (U.S.) 198, the judge had instructed the jury, that "if the defendants in the case did not make the recommendation upon such authority or information as you may think . . . they ought to have acted upon, you will charge them." This was held error. To the same effect is Tryon v. Whitmarsh, 1 Met. 1. The question for the jury is, in fact, as to the good faith of the defendant; Cowley v. Smyth, 46 N. J. L. 380. If the defendant had no reason for believing in the truth of his statement, his actual belief is immaterial where he speaks as of his own knowledge; Cabot v. Christie, 42 Vt. 121; Fisher v. Mellen, 103 Mass, 503; Litchfield v. Hutchinson, 117 Mass, 195; Cole v. Cassidy, 138 Mass. 437; Allen v. Hart, 72 Ill. 104.

The case of Cowley r. Smyth, supra, points out a distinction to be observed, in holding a defendant for a statement as of his own knowledge, between cases in which the fact represented is susceptible of knowledge, and cases in which the statement must, notwithstanding its form, be intended merely to express an opinion. In cases in which the representation was not false, to the defendant's knowledge, the court say: "The probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form when the defendant has added to a representation which turns out to be untrue, but was not false to his knowledge. - an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject-matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief,

the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertion. . . . But when the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in Haycraft v. Creasy, is to be taken secundum subjectum materiam, as meaning no other than a strong belief founded on what appeared to the defendant to be reasonable and certain grounds.' In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant; but when the evidence is in, the issue is whether the defendant honestly believed the representation to be true. In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in Haycraft v. Creasy, give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon the subject (Shrewsbury v. Blount, 2 M. & G. 475), and show the general reputation for trustworthiness of the person whose credit he affirmed; Sheen v. Bumpstead, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was bona fide, - whether, at the time he made the representation, he honestly believed that his representation was true." To the same effect, Page v. Bent, 2 Met. 371.

It is obvious, however, that while a representation as to value or the solvency of another, no matter how strongly stated, must remain a matter of opinion, and hence will render the defendant liable only if not believed by him, or if recklessly made without any ground whatever for his belief, a representation of this character may be made in such a form as to justify the inference that the opinion is based upon facts known to the defendant, which have led him to the opinion expressed. In such a case, unless facts of the kind are known to the defendant, he will be liable in the same way as he would be if the representation had been of a matter of fact; Marsh v. Falker, 40 N. Y. 562, pp. 566 et seq.; Doty v. Campbell, 1 How. Pr. N. S. 101.

Liability not dependent on a benefit to the defendant. It is not necessary, in order to render one hable for a misrepresentation, that he should have derived a benefit from it, or that he should have actually intended to defraud the plaintiff: Patter v. Gurney, 17 Mass. 181; Schwenk v. Naylor, 102 N. Y. 683; Boyd's Executors v. Browne, 6 Penn. St. 310. "No motive for a representation which is talse and may be injurious can be good; and a lie to help a friend is not the less a he because it is not designed to injure the person to whom it is told; it is enough to stamp it with the character of actual fraud, that it may lead him to a risk which he would otherwise shun;" Bokee r. Walker, 14 Penn. St. 139; Allen v. Addington, 7 Wend. 9, 22; Patten v. Gurney, 17 Mass. 182; Hart v. Tallmadge, 2 Day 381; Endsley v. Johns, 120 Ill, 469; Cowley v. Smyth, 46 N. J. L. 380. If the defendant intended to derive a benefit from the misrepresentation, the courts are much more inclined to regard it as fraudulently made than where there is no such intention, and they will not always insist in such cases on proof of the defendant's knowledge of the falsity of his statement; Beebe v. Knapp, 28 Mich. 53, 76.

Who may sue. — One who makes a misrepresentation must, to render himself liable, have made it with the intention that it shall be acted on, by the person to whom it is made, or to whom he intended it should be communicated, and he is therefore responsible to such persons only, as it was intended for. "When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence, and whoever may overhear the statements and go away and act upon them can reasonably set up no claim to having been defrauded if they prove false; "Cooley on Torts, *493; Rawlings v. Bean, 80 Mo. 614.

It was accordingly held in McCracken v. West, 17 Ohio 16, a case in which the defendant had addressed a letter of recommendation to one person which had been presented to and relied on by another, that the latter had no right of action. But a representation may be made with a view to its being acted on by any one of a class, and to recover in such a case the plaintiff need only bring himself within the class; Allen v. Addington,

7 Wend. 9; same case on appeal, 11 Wend. 374; Clopton v. Cozart, 13 Sm. & M. 363; Carvill v. Jacks, 43 Ark. 454. It is immaterial whether the statement be made directly to plaintiff or to a third person with the intent that he repeat it to the plaintiff; Watson v. Crandall, 78 Mo. 583. It is on these principles that a person making a false and fraudulent statement to a commercial agency, for the purpose of having it communicated to any one interested in his pecuniary responsibility, renders himself liable to any inquirer who relies on the report based on his statement; Eaton v. Avery, 83 N. Y. 31; Genesee Co. Savings Bank v. Michigan Barge Co., 52 Mich. 164; Holmes v. Harrington, 20 Mo. Appeals 661; Macullar v. McKinley, 49 N. Y. Super. Ct. 5; aff'd. 99 N. Y. 358; Goodwin v. Goldsmith, 49 N. Y. Super. Ct. 101.

In Williams v. Wood, 14 Wend. 126, it was held that where the defendant gave a recommendation to an insolvent, he was liable to any one that relied on it to his injury, and that the defendant could not show that it was given to enable the person recommended to make a particular purchase. The decision may be regarded as correct on the ground that the recommendation was a general one on its face, and there was nothing to lead plaintiff to believe that it was not intended for him as well as for another. This distinguishes the case from McCracken v. West, supra. But in Addington v. Allen, 11 Wend. 374, at p. 383, Chancellor Walworth queries whether a person giving a false recommendation can be made liable to any one except the person for whom the recommendation was intended.

Plaintiff's reliance on representation.— The plaintiff in order to recover for the deceit must prove that he acted in reliance on the representation; Nye v. Merriam, 35 Vt. 438; Hagee v. Grossman, 31 Ind. 223; Humphrey v. Merriam, 32 Minn. 197; Runge v. Brown, 37 N. W. Rep. (Neb.) 660. If he was cognizant of the falsity of the representation, or did not believe it, he cannot recover, for in that case he has not been deceived; Clopton v. Cozart, 13 Sm. & M. 363; Proctor v. McCoid, 60 Ia. 153; Nelson v. Luling, 62 N. Y. 645; Bowman v. Carithers, 40 Ind. 90; Anderson v. Burnett, 5 Miss. 165; Edick v. Crim, 10 Barb. 445; and the plaintiff must prove affirmatively that he did believe the statement and relied on it; Humphrey v. Merriam, 32 Minn. 197; therefore if the plaintiff investigated the facts concerning which the representation was made, he cannot be

said to have relied on the representation, and cannot recover; Hagee v. Grossman, 31 Ind. 223: Poland v. Brownell, 131 Mass. 138; Tuck v. Downing, 76 Ill. 71; Anderson v. McPike, 86 Mo. 293. If the defendant has made a misrepresentation, and has also given a warranty, he is not hable for the decent if the plaintiff relied on the warranty, and not on the representations: Holdom v. Aver. 110 III. 448; Humphrey v. Merriam, 32 Minn. 197; nor is he liable if the plaintiff was not induced by the representation to act. In Ming v. Woolfolk, 116 U. S. 599, it appeared that the plaintiff would have acted as he did in the absence of any representation on the part of the defendant, and he was therefore not allowed to recover. It is not necessary, however, as stated supra, that the false representation should have been the sole inducement that influenced the plaintiff; if it influenced his conduct materially, he can recover. Where the person deceived has learned of the falsity of the statements made, before the completion of his negotiations, and while he is still at liberty to withdraw, he cannot hold the defendant for the misrepresentation; Whiting r. Hill, 23 Mich. 399; Vernol c. Vernol, 63 N. Y. 45.

Not every representation may be relied on. There are many cases in which the person deceived cannot recover, for the reason that common prudence should have taught him to distrust the statement made to him, either because of the form in which it was made, or because of the relations between himself and the person making the statement. If the statement as made implies that the speaker has doubts of its correctness, or if in any other way the person to whom the representation is made, is put upon inquiry, he must not rely on the representation.

"Dealer's talk."— A person who is negotiating with another must not put entire confidence in the statements which are made to him. He knows that it is to the interest of the person with whom he is dealing to drive as good a bargain as he can, and he must guard against being misled. The courts have always permitted what is known as "dealer's talk." It is a general rule that as between parties who are negotiating, an expression of opinion as to the value or utility of an article to be sold, or as to the advantage to be derived from making the contract, will not render the person making it liable. The uniformity of the decisions to this effect has given rise to the erroneous im-

pression that a person can in no event be held liable for a fraudulently false opinion. But this class of cases goes entirely on the ground that the person deceived had no right to rely on statements made by one whose interests were antagonistic to his. The cases in which this has been held are not confined to those in which there has been an expression of opinion. Many cases in which facts have been misrepresented, with a view to deceive, have held the purchaser to be remediless. There is much conflict in the authorities as to what misstatements of facts are actionable; but none where there has been merely an expression of opinion.

Statements as to value. — That a statement of the value of property made by the vendor to the vendee must not be relied on, is uniformly held; Ellis v. Andrews, 56 N. Y. 83; Bristol v. Braidwood, 28 Mich. 191; Sieveking v. Litzler, 31 Ind. 13; Anderson v. McPike, 86 Mo. 293; Walker v. Mobile, &c., R. R. Co., 34 Miss. 245; Medbury v. Watson, 6 Met. 259; Hunter v. McLaughlin, 43 Ind. 38; Kimball v. Bangs, 144 Mass. 321; cf. Chrysler v. Canaday, 90 N. Y. 272; McAleer v. Horsey, 35 Md. 459.

In Ellis v. Andrews, supra, Judge Grover says: "Upon the question of value the purchaser must rely upon his own judgment, and it is his folly to rely upon the representation of the vendor in that respect; but in regard to any intrinsic fact affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor, and if he does so rely and the assurances are fraudulently made to induce him to make the contract, he may have an action for the injury sustained." The distinction pointed out between a bare statement of the value, and statements of fact by which the vendor seeks to show the correctness of his opinion, is generally acknowledged; Sieveking v. Litzler, 31 Ind. 13; Grim v. Byrd, 32 Gratt. 293; McAleer v. Horsey, 35 Md. 439; Stewart v. Stearns, 63 N. H. 99; Weidner v. Phillips, 39 Hun 1. An opinion as to the productiveness of land will not lay the foundation for an action; Mooney v. Miller, 102 Mass. 217; Gordon v. Parmelee, 2 Allen 212; nor as to its quality; Sherwood v. Salmon, 2 Day 128.

But if the seller induce the buyer not to make inquiries as to the value, he may be liable for a misrepresentation of value; Hanger v. Evins, 38 Ark. 334; Weidner v. Phillips, 39 Hun 1;

Stewart v. Stearns, 63 N. H. 99. So if the value of the thing sold can only be known to experts, the purchaser may rely on the value expressed by the seller, if he is a dealer in such goods; Picard v. McCormak, 11 Mich. 68; Kost v. Bender, 25 Mich. 515; Hanger v. Evins, 38 Ark, 334; McKee v. Eaton, 26 Kas. 226; cf. Allen v. Hart, 72 Ill. 104. An examination of the cases in which misstatements of fact have been made, shows them to be in direct conflict with each other. In some cases it is held that an action will lie for a fraudulent statement of the number of acres which a piece of land contains; Whitney r. Allaire, 1 N. Y. 305; Beardsley v. Duntley, 69 N. Y. 577; Sturkweather v. Benjamin, 32 Mich. 305; Coon v. Atwell, 46 N. H. 510; Sangster v. Prather, 34 Ind. 504; Hill v. Brower, 76 N.C. 124; while other cases support the opposite view; Gordon v. Parmelee, 2 Allen 212; Mooney v. Miller, 102 Mass. 217; Credle v. Swindell, 63 N. C. 305. In Sherwood v. Salmon, 2 Day 128, it was held that a fraudulent representation by the vendor of the situation of the land created no liability, even if the vendee had no opportunity of examination.

It is held in some cases that a statement of the price paid by the vendor for what he is selling does not render him liable if false and fraudulent; Holbrook v. Connor, 60 Me. 578; Bishop v. Small, 63 Me. 12; Cooper v. Lovering, 106 Mass, 77; Medbury v. Watson, 6 Met. 246; Mooney v. Miller, 102 Mass, 217; while the contrary is held in Ives v. Carter, 24 Conn. 392; McFadden v. Robison, 35 Ind. 24; Green v. Bryant, 2 Kelly 66; Van Epps v. Harrison, 5 Hill 63; McAleer v. Horsey, 35 Md. 439; Somers v. Richards, 46 Vt. 170. The difference here may be due to the view the courts take of the materiality of such a statement.

No action unless damage. — No action will lie unless the plaintiff can prove his damages; Ming v. Woolfolk, 116 U. S. 599; Freeman v. McDaniel, 23 Ga. 354; Fuller v. Hodgden, 25 Me. 243; Danforth v. Cushing, 77 Me. 182; Runge v. Brown, 37 N. W. Rep. (Neb.) 660; Wemple v. Hildreth, 10 Daly 481; Byard v. Holmes, 34 N. J. 296; Nye v. Merriam, 35 Vt. 438.

Liability of directors for fraudulent prospectus. — "The directors of a company who knowingly issue or sanction the circulation of a false prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the community, and to induce the public to purchase

its stock, are responsible to those who are injured thereby;" Morgan v. Skiddy, 62 N. Y. 319; Terwilliger v. Great West. Tel. Co., 59 Ill. 249; Cross v. Sackett, 6 Abb. Pr. 247; cf. also Fenn v. Curtis, 23 Hun 384; Booth v. Wonderly, 36 N. J. L. 250; Paddock v. Fletcher, 42 Vt. 389. The officers of a corporation are liable in the same manner for publishing a false report of the condition of the corporation, to any one injured by relying on the same; Morse v. Swits, 19 How. Pr. 275.

Statement of one's own solvency. — There remain for consideration some questions in regard to the action for fraudulent representations of solvency. It is held in some cases that, as between contracting parties, a statement by one of his solvency is not a representation on which the other can rely; Lyons v. Briggs, 14 R. I. 222; Jude v. Woodburn, 27 Vt. 415. But such a statement regarding one's own solvency is to be regarded as a statement of facts, and the better view would seem to be that an action will lie in the case mentioned.

Meaning of "solvency." — A representation of solvency means that the debtor is able to meet all his obligations, not merely the one incurred on the strength of the representation; Daniels v. Dayton, 49 Mich. 137; McKown v. Furgason, 47 Ia. 636. It does not mean that the debtor has sufficient property subject to execution to meet all his obligations; McKown v. Furgason, supra; Einstein v. Marshall, 58 Ala. 153.

It is not essential to the maintenance of the action, that a judgment should have been obtained against the debtor and execution issued against his property; Winter v. Baudel, 30 Ark. 362; nor is it necessary, in fact, that an action should have been brought for the collection of the debt before suing for the deceit; Kidney v. Stoddard, 7 Met. 252; cf. Weeks v. Burton, 7 Vt. 67; Tryon v. Whitmarsh, 1 Met. 1.

Rule of damages. — Where one has parted with property on a fraudulent misrepresentation of the vendee's solvency, the true measure of damages would seem to be, not the price agreed to be paid, but the value of the property at the time of the sale, not exceeding the price agreed on; Crews v. Dabney, 7 Littell (Ky.) 278; cf. Spikes v. English, 4 Strobh. 34; Horne v. Walton, 117 Ill. 141; but vid. Sibley v. Hulbert, 15 Gray 509.

Objections against Pasley v. Freeman. — The objections which have been urged against Pasley v. Freeman have been, (1) that the allowance of the action involves a violation of the principle

of the Statute of Frands; (2) that the representation of the financial responsibility of another is not a matter susceptible of knowledge, and must in the very nature of things be but the expression of a matter of opinion. The latter objection has been dealt with already.

The Statute of Frauds does not apply.—The objection that the case comes within the spirit of the Statute of Frauds is clearly untenable. That deals exclusively with contracts, while this action is founded on tort, and a recovery in this class of cases does not prevent the plaintiff recovering anew from the debtor; Wise v. Wilcox, 1 Day 22; Boyd's Executors v. Browne, 6 Penn. St. 310. In Upton v. Vail, 6 Johns. 184, Kent, C. J. dealing with this objection, says: "This, I apprehend, is an objection arising from public policy and expediency; for it is certain that the Statute of Frauds as it now stands has nothing to do with the case."

Statutory enactments requiring the representation to be in writing. This view is universally accepted, and in accordance with the idea that the case comes within the mischief of the Statute of Frauds, that has been extended by enactment to cover the action for misrepresenting another's financial condition.

The following states have provisions requiring representations concerning the credit of another to be in writing, in order to bind the person making them; Alabama (Code, § 1734); California (Hittell's Cod, § 11974); Idaho (Rev. Stat. § 6011); Indiana (Rev. Stat. § 4909); Kentucky (Gen. Stat. chap. 22, § 1); Maine (Rev. Stat. 1883, chap. 111, § 3); Massachusetts (Public Stat. chap. 78, § 4); Michigan (How. Annot. Stat. § 6188); Missouri (Rev. Stat. 1879, § 2515); Oregon (Annotated Laws, § 786); South Carolina (Gen. Stat. 1882, § 2024); Utah (C. Civ. P. § 1210); Vermont (Rev. Laws 1880, § 983); Virginia (Code, § 2840, 1); West Virginia (Amd. Code 1884, § 98, 1); Wyoming (Rev. Stat. 1887, § 1249, 6).

Application of the statute. — But notwithstanding the statute, it is held in Kentucky that in "any case of actual fraud, in wantonly misrepresenting a man's credit," there need be no writing any more than in case of any other kind of fraud in fact; and that it is "not actually fraudulent to affirm absolutely as true that which the asserter believes to be true. The malus animus is the essential and distinctive element of actual fraud;" Warren v. Barker, 2 Duv. 155; cf. Ball v. Farley, 81 Ala. 288.

In Massachusetts, on the other hand, it is held that the statute applies so long as the intent is to induce the plaintiff to give credit to a third party; Mann v. Blanchard, 2 Allen 386; Wells v. Prince, 15 Gray 562; Kimball v. Comstock, 14 Gray 508; and it is immaterial that the defendant had an ulterior motive in making the misrepresentation, and expected to derive a benefit from the plaintiff's giving the credit. In Kimball v. Comstock, supra, the defendant had induced plaintiff to sell to the debtor, with a view of satisfying a demand held by the defendant against the debtor, out of the goods sold. Yet it was held to be within the statute. To the same effect are Mann v. Blanchard, supra; Wells v. Prince, supra; Cook v. Churchman, 104 Ind. 141; Hunter v. Randall, 62 Me. 423. But the statute will not apply unless the representation is made with a view to induce the plaintiff to give credit to another. Where, therefore, the defendant represented the maker of a note held by him to be solvent, and thereby induced plaintiff to accept it as collateral security for a debt owing by defendant to plaintiff, the statute was held to have no application; Belcher v. Costello, 122 Mass. 189. In Michigan the statute was held not to apply in a similar case; Huntington v. Wellington, 12 Mich. 10. See, also, Lenheim v. Fay, 27 Mich. 70; cf. St. John v. Hendrickson, 81 Ind. 351.

In Bush v. Sprague, 51 Mich. 41, it was held that, in an action for conspiracy, the statute did not prevent parol representations of another's solvency, being put in evidence to prove the conspiracy. The case of Cook v. Churchman, 104 Ind. 141, is apparently in conflict with this.

These statutes of doubtful expediency.— The policy of these statutes may well be doubted. In Ewins v. Calhoun, 7 Vt. 79, the court say: "That the evidence of contracts which require mutual consent should be required to be in writing, or have any other prescribed formalities, is practicable at least, and may be useful. But that the proof of facts which constitute fraud or crime should be so privileged, would exempt most offenders. To undertake to prevent fraud, by supposing all verbal communications false, would destroy all confidence in business and in society."

DOE d. RIGGE v. BELL.

$MICH = 34 \ GEO \ 3.$

[RIPORDED 5 1, R. 471.]

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day, and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas.

This ejectment was on the demise of T. Rigge, guardian of H. and M. Rigge, infants. At the trial at the last assizes at York, before the Lord Chief Baron, it appeared, that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's Farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22nd of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above fourteen.

The defendant's counsel objected, first, That the notice to quit was insufficient; the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day; 2ndly, That the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of fourteen. And the plaintiff was nonsuited.

Chambre, on a former day, obtained a rule, calling on the defendant to show cause why this nonsuit should not be set

aside. As to the first objection, he said, this was a holding from Lady-day, and that, therefore, the notice to quit was regular; and, as to the second, he produced an affidavit, in which it was stated that one of the daughters of the lessor of the plaintiff was under fourteen years of age.

Cockell, Serjeant, and Walton, were now to have shown cause against the rule; but

Law, Chambre, and Barrow, were desired to answer the first objection; as to which they argued, that as that agreement for seven years was void by the Statute of Frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day, when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

Lord Kenyon, C. J. — Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term without having entered into any new contract, he holds upon the former terms. Now in this case it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor chose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.

See Richardson v. Gifford, 1 A. & E. 52; Beale v. Sanders, 3 Bing. N. C. 850.

[This and the succeeding case, with the notes thereto, are retained in this edition, notwithstanding the case of Walsh v. Lonsdale, cited infra, as they deal with the law as recognised both at law and in equity prior to the Judicature Acts, and, so far at all events as they deal with the position of a tenant holding over after the expiration of a term, are unaffected by that decision.

Before the Judicature Act], if a party occup[ied] and paid rent under an agreement for a term, then, although such agreement [might] not operate to create the proposed term, either in consequence of its not amounting to a lease, as in *Richardson* v. *Gifford*, 1 A. & E. 52, or not being a good execution of a power, as in *Beale* v. *Sanders*, 3 Bing. N. C. 850, yet the party so occupying and paying rent was considered as holding upon all the terms of the agreement not inconsistent with a tenancy from year to year, such as the obligation to repair, and the like. See *Richardson* v. *Gifford*, and *Beale* v. *Sanders*. So in *Doe* d. *Thompson* v. *Amey*, 12 A. & E. 476, where a party entered, and paid rent under an agreement for a future lease of years, which

was to contain a covenant not to take successive crops of corn, with a condition of re-entry for breach of covenants, it was held that ejectment might be brought upon successive crops of corn being taken by the tenant, see also Dow d. Oct. rsh. w. N. Br. (1.h. 6 Esp. 106). Them is v. P. C. (1. 1.1 & N. 60.9). Watson v. W. a.t. s. Exch. 355; and Beanett v. Irriand. E. B. & E. 326]. In Pistor v. Cator, 9 M. & W. 315, a tenant entered upon a copyhold under an agreement for a lease as vormes the limits themse could be obtained, in which he was to covenant to repair. No licence ever was obtained, or lease made, yet held that he was bound to repair. This seems a strong case, [and see Martin v. Smith. L. R. 9 Ex. 50; 40 L. J. Ex. 42; W. gatt. v. C. (1.), 36 L. T. 643

In Lee v. Smith, 9 Exch. 662, a tenant entered into the possession of premises under an agreement in writing, which stipulated for a longer term than three years. This document, not being under seal, was void as a lease by the operation of the 8 & 9 Vict. c. 106. The rent was to be paid quarterly, and in advance. The tenant paid rent on several occasions, but not, in fact, in The receipts, however, stated that the payments were made in advance. advance. It was held, that although the agreement was void under the statute, there was sufficient evidence to show that the rent was payable quarterly in advance. "Although the agreement was void," said Baron Parke, "as not being under seal, as required by the 8 & 9 Vict. c. 106, there was ample evidence that the party in quistion consented to be tenant from year to year upon the terms that the rent should be payable at the beginning instead of at the end of each quarter." The presumption which arose in cases of this description, from the fact of the payment of rent, was the same against a corporation as against ordinary lessors. Doe d Pennington v. Tamere, 12 Q. B. 998.]

There [was] this peculiarity, however, in the tenancy created by payment of rent after entry under an agreement for a lease, or a void lease, that although it was considered a tenancy from year to year during the continuance of the term proposed to be granted by the lease, and could only be put an end to by the landlord, after the usual notice, Computer v. Towner, 6 M. & W. 100, yet it was determined at the expiration of that term, without any notice to quit. Dor d. Till v. Stratton, 4 Bing, 416; Berrey v. Lindley, 3 M. & Gr. 511; though the agreement under which the tenant entered provided for the extension of the term specified therein upon certain conditions. Due d. Davenish v. Moffatt, 15 Q. B. 257.

[Such was the state of the law on this subject prior to the passing of the Judicature Acts. In Walsh v. Lousdale, 21 Ch. D. 9: 52 L. J. Ch. 2, however, it was laid down by Jessel, M.R., that since those Acts the rule no longer holds that a person occupying under an executory agreement is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every court as holding on the terms of the agreement. The facts of the case were that the plaintiff had agreed to take a lease from the defendant of a mill for seven years at a rent of 30s, a year for each loom run, the plaintiff not to run less than 540 looms. The lease was to contain such stipulations as were inserted in a certain lease referred to in the agreement. That lease provided that there should at all times during the continuance of the demise, except in the last year of the term, be due and payable in advance on demand one whole year's rent of the premises demised in addition to the proportion, if any, of the said yearly rent due and unpaid for the period previous to such demand. The plaintiff had been let into possession, and had paid rent quarterly, but not in advance, up to January 1st, 1881. Before the next quarter's rent became due the defendant demanded a year's rent in advance, together with the proportionate part of the rent from the 1st of January, and on the plaintiff's refusal to pay it put in a distress for the amount. In an action in the Chancery division for damages for illegal distress, an injunction, and specific performance, the plaintiff applied for an interim injunction. One of the grounds of the application was that inasmuch as the rent payable depended upon the number of looms run, there could be no fixed sum payable in advance as rent, but assuming the rent to be ascertained, it was further argued that the plaintiff was only tenant from year to year on such of the terms of the agreement as were not inconsistent with such a holding, and that the clause making a year's rent always due in advance was obviously inconsistent with a tenancy which might be determined by six months' notice. Fry, J., granted the injunction, but only on the terms of paying the whole amount of rent claimed into court. This decision was affirmed on appeal, with a slight modification, immaterial to the present question. The court did not, upon an interlocutory proceeding, finally determine the questions in the action, but they expressed a decided opinion that the rights of the parties must be ascertained by reference to the lease as it ought to be framed pursuant to the contract between the parties. In this view there was nothing to prevent the lessor exercising then the same right of distress which he would have acquired had the lease been executed. It is to be observed, however, that the person complaining of the distress was himself at the same time claiming specific performance of the lease, and could not therefore, in a court of equity, be heard to complain of one of the provisions in an agreement which he was himself setting up; and this appears to be the ground of the decision.

Jessel, M.R., says: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted." It may possibly still be open to question whether if the tenant had not claimed specific performance, but had brought an action in the Queen's Bench Division for the wrongful distress, the defendant, who had asserted a legal right before he had perfected it, as he might have done, by proper proceedings for that purpose, would have been held to be precisely in the same position as though he had done so, or whether, to put the proposition in another form, it is the law that in all proceedings after entry between the parties to an agreement which by the Statute of Frauds and the 8 & 9 Vict. c. 106 is void as a lease, and can operate where the tenant has entered as creating an estate at will only, "either in law or equity" (see the words of the Statute of Frauds set out in the note to the next case) they are in precisely the same position as if those statutes had never passed.]

The liability of a party holding over after the expiration of a tenancy by agreement, is rather a matter of evidence than of law; and although Lord Kenyon in the principal case, and Lord Ellenborough in *Digby* v. *Atkinson*, 4

Camp 17s, seem to lay down the rule as one of law yet in al. the more recent cases upon the subject, the existence of any tenancy in the party heiding over beyond a tenancy at sufferance which exists by law in every case where a person holds over by wrong after the determination of a rightful estate, but which imports no privity between the landlord and tenant, Co. Litt 57b, 270b, 271b, as well as the terms upon which such tenancy exists, have been considered as questions for the jury: the construction of any written agreement and the applicability of its terms to a tenancy from year to year, being for the decision of the court. See the remarks of Lord Denman, C. J., and Littledaic, J., in Johnson v. The Course concluses of St. Peter Hereford, 4. A. & E. 525; see also dones v. She iss. 4. A. & E. 532, Tiper v. Watson, Car & Marsh. 491; and The Mayor of Theifard v. Tyler, s. Q. B. 95, in which case Mr. Justice Wightman says, "when a party is allowed to hold over after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law."

The law, it is apprehended, does not infer any particular contract from the mere fact of entry under an agreement for a future lease of a holding over after the expiration of a past agreement, per Lord Abinger, C. B., W. entry & Komt. S. M. & W. 575 - See also Jenner & Cheng, I. M., R. 217; Jones & Shears, 4. A. & E. 832; Chaptern & January & May 101 per Parko, B.; Rischy & Robe, 11 M. & W. 16. The Movement Particular V. Intersector The question in all these cases is one, not of law for the judge, but of fact for the jury - Wolker & total 6. H. & N. 594, Online & M. & C. 706.

L. R. I. Ex. 159; L. and A. W. Rullway Cheng & West, L. R. 2, C. P. 553, 36

L. J. C. P. 245; and Corneck & Stubbs, L. R. 5, C. P. 834, 39 L. J. C. P. 202

But where the party so occupying pays rent according to the terms of the agreement, either past or future, and thereby becomes tenant from year to year, the inference is irresistible, in the absence of anything to show a digit cent understanding, that the parties intend the occupation to continue upon such of the terms of the agreement as are not inconsistent with such a tenancy; and this is probably all that was intended by Lord Kenyon in the principal case, and by Lord Ellenborough in Digby v. Atkinson. See Doe d. Monck v. Grickie, 5 Q. B. 841: Finch v. Miller, 5 C. B. 428 [Kelle v. Firt com, L. R. 9 C. P. 681]; Hyatt v. Griffliths, 17 Q. B. 508; and the note to the next case.

[It is obvious that the ordinary inference from a holding over by a lessee after the expiration of a lease and a receipt of rent may be rebutted by showing that the person who is the owner of the lead when the lease expires, and who receives the rent, is not acquainted with the terms of the original letting. Thus, where a remainderman allowed a tenant who had been let in by the previous tenant for life to remain in possession after the neath of the tenant for life, and the consequent expiration of the lease, and received from him the old rent but did not know that the lease had contained a clause providing that at the end of the tenancy the lessee was to be paid for all fruit trees planted by him on the premises, it was held that this stipulation did not form one of the terms of the new tenancy. Outley v. Monck, 3 H. & C. 706.

The rules mentioned above apply where there has been a real holding over. The mere accidental retention by a yearly tenant of the key of the premises after giving a notice to quit, and removing with his goods from the house, is not any evidence of an intention to continue the tenancy. *Gray v. Bompus*, 11 C. B. N. S. 520.]

CLAYTON v. BLAKEY.

MICH. - 39 G. 3.

[REPORTED 8 T. R. 3.]

Though by the Statute of Frauds it is enacted that all leases by parol, for more than three years, shall have the effect of estates at will only, such lease may be made to enure as a tenancy from year to year.

This was an action against a tenant for double rent for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence that defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to guit referred; and the Statute of Frauds directing that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at the trial, at the last assizes for Northumberland, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. Rooke, J., however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

Lord Kenyon, C. J.—The direction was right, for such a holding now operates as a tenancy from year to year. The

meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year.

Per Curiam.

Rule refused

This r two cases, although loudly impugned by Mr Watkins, in his able little treatise on Conveyancing, have never since been invalidated by judicial decision. Nor does either of them seem inconsistent with the Statute of Frands. But see the notes to the last case, and Watk v. L. is the there cited, as to the effect of the Junicature Act. The Statute of Francs enacts, in sec. 1, "That all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in to or out of, any messuages manors, lands, tenements, or hereditaments, made or created by livery and seism only, or by parol, and not put in writing and signed by the partness of making and creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases to the contrary not-withstanding."

SEC. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-thirds part at least of the value of the thing demised."

Now it is clear, that the words of these sections are satisfied by holding, that a parol demise for more than three years, creates, in the first instance, an estate at will, strictly so called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year, by payment of rent, or other circumstances indicative of an intention to create such yearly tenancy; and this perhaps is all which was decided by the two cases in the text, for, in Doe v. Bell, we are expressly told that the defendant had paid reat; and though, in Clayton v. Blakey, there is no express mention of rent having been paid, yet, as the tenant had been in possession for three years, and that, under a rent for the action was for double rent;, it is more than probable that some payment of rent had taken place during that period. Indeed, to deny to such a payment the effect of creating a tenancy from year to year, in cases where the letting was by parol for more than three years, would be to contravene, rather than obey, the enactment of the Statute of Frauds, since that act evidently means that such a parol lease shall enure in every respect as a lease at will. Now one of the incidents of a lease at will is its convertibility, by payment of rent, into a tenancy from year to year. See Doe v. Weller, 7 T. R. 478; Roc v. Rees, 2 Bl. 1171; and see 7 Bing. 458. ubi per Tindal, C. J., "If a party enters and pays, or promises to pay a rent certain, or settles it in account (see Cox v. Bent, 5 Bing. 185), a new agreement may be presumed, under which the landlord may have a right to distrain."

But the decisions (it is believed) have not gone so far as to establish that a parol lease for more than three years at a fixed rent will, without any other circumstance, create an interest from year to year, so as to give the tenant a

right to enter indefeasible except by six months' notice, ending with the expiration of the year. Such a construction would, perhaps, be incompatible with the strict letter of the Statute of Frauds; nor (it is believed) has it ever been held, that a parol demise for more than three years, at a fixed rent, even when coupled with the lessee's entry under it, will, before payment or acknowledgment in account of any part of the rent reserved, have the effect of rendering him tenant from year to year. Indeed, the contrary appears involved in the case of Doidge v. Bowers, 2 M. & W. 365, where three persons entered under a lease for seven years, not signed by the lessor, and, therefore, inoperative under the Statute of Frauds: payments of rent were made, but not being shown to have been with the assent of one of the three, it was held that, as against her, there was no evidence of a tenancy from year to year, she not having resided a year on the premises; Parke, B., saying, " Under the original contract no demise could be created, but a mere tenancy at will. Then, in order to constitute a new tenancy, it must be shown that all the three parties agreed to vary it by a new contract for a tenancy from year to year." See Denn v. Fearnside, 1 Wils. 176; Goodtitle v. Herbert, 4 T. R. 680. [As to where equity will enforce a verbal agreement by a landlord not to

[As to where equity will enforce a verbal agreement by a landlord not to disturb his tenant during the residue of the landlord's own term, even though such unexpired term exceeds three years, see *In re Keys*, L. R. 16 Eq. 521, which was distinguished in *Wood* v. *Beard*, 2 Ex. D. 30, 46 L. J. M. C. 100; *Cole* v. *Pilkington*, L. R. 19 Eq. 174; *Kusel* v. *Watson*, 11 Ch. D. 129; 48 L.

J. Ch. 413; Cheshire Lines v. Lewis, 50 L. J. Q. B. 121.]

Tenancies from year to year seem to have owed their origin to the prevalence of a strong and very natural feeling of the justice and good policy of allowing a tenant who has sowed, to reap. This feeling manifested itself during the earliest ages of our law in the doctrine of emblements, which entitled a tenant at will to the crops he had sowed, and gave him free ingress and egress to reap and carry them, after the determination of his tenancy by the landlord. (Litt. sec. 68, and the Commentary.) Now the land could have been of but very little value to the landlord while covered with crops belonging to his late tenant, and subject to such a right of entry; and to give those crops and that right of entry to a tenant at will was in effect to say that his enjoyment of the land should not be put an end to by the determination of the landlord's will respecting his estate in it. But people were apt to confound the distinction between the right of the enjoyment and the right to the estate; and seeing that the landlord could not arbitrarily put an end to the former, they concluded that he was similarly restrained as to the latter. "So long ago," says Lord Kenyon, in Doe d. Martin v. Watts, 7 T. R. 85, " as the time of the year-books, it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without a reasonable notice to quit." The passage in the yearbooks referred to by his lordship is 13 Hen. 8, 15 b, ubi per Wilby, "Si le lessor ne done a luy garnir devant le demy an il justifiera in auter an et issint de an in an." [See also the judgment of Mr. Justice Buller, in Right v. Darby, 1 T. R. 163, and that of Mr. Justice Willes in Jones v. Mills, 10 C. B. N. S. 788.] And it was better for the lessor himself to establish this custom, since a late tenant at will entitled to emblements would have had the whole profits of the land, from the determination of the will till the harvesting of the crops, without paying any rent for it; whereas the tenant from year to year pays rent until the day on which he quits the premises.

It is now well settled [subject to the Agricultural Holdings Act, 1883, 46

& 47 Vict. c. 61, s. 33, which see infra!, that the reasonable notice to quit to which the tenant is entitled, is half-a-year's notice, ending with the period at which his tenancy commenced; see Doc v. Porter, 3 T. R. 13. | In Rogers v. The Hull Dock Company, 34 L. J. Chan. 164, Vice-Chancellor Wood was of opinion that on a tenancy from year to year, under a written agreement, which began at Lady-day, and was determinable by the terms of the contract by a "six months' notice," the word "months" meant lumar months, there being no custom or usage of the district proved so as to attach a different meaning to the words. But this view was not necessary for the decision of the case, there being evidence to show that the words "Lady-day" and "Michaelmas," as used in the agreement, meant old Lady-day and old Michaelmas; so that the notice which was given on the 9th of October was sustainable as having been given before the commencement of the halfyear ending with the period at which the tenancy had commenced. And it is apprehended that it is clear that a notice of six lunar months is not sufficient to determine an ordinary yearly tenancy. The true rule, as established by the decisions, is that the notice must be a half-year's notice; it must be given, as the year-book says, "doesn't be doing an," subject to this qualification, that where the rent is payable on the usual feast days, a notice, on or before one of the feast days in the earlier half of the tenancy, to quit on the feast day at the conclusion of the tenancy is sufficient, although there may be fewer than one hundred and eighty-two days between the two feast days. Roe d. Durant v. Doc, 6 Bing 574; Iron v. Kniephilog, 7 T. R. 63; Howard v. Weinslog, 6 Esp. 53; Doc v. Wrightman, 4 Esp. 6; Doc v. Green, ib 198; and South's Landlord and Tenant, 369 (3rd edition). A period of six lunar months of twenty-eight days, is not half a year, nor do two such periods, as is obvious, constitute a year, the division of time with reference to which the reasonable notice to quit required by law is calculated. See also Catesby's Case, 6 Rep. 61. And where the tenancy commences on one of the feast days a notice to quit given on the day after one of them is bad; e.g., notice given on the 26th March to quit on the 29th September, Morgan v. Davies, 3 C. P. D. 260.

It has been held that the notice must end with the period at which the tenancy commenced, even although the demise be in terms for one year and six months certain. Don d. Robinson v. Dobell, 1 Q. B. 806; see also Don d. Cornwall v. Matthews, 11 C. B. 675. Berry v. Lindley, 3 M. & Gr. 498, [Sambbill v. Franklin, L. R. 10 C. P. 377;] but in Doe d. Buddle v. Lines, 11 Q. B. 402, where a tenant for a term commencing at Christmas, made an underlease commencing also at Christmas, but ending at Midsummer, and the undertenant held over and paid rent, it was held, in an ejectment brought by the lessee against the sub-lessee, that the tenancy from year to year created by the payment of rent, commenced at Midsummer and not at Christmas, and that the notice to quit must be given accordingly. The grounds of this decision do not appear very clearly in the judgment: [and see Kelly v. Patteson, 43 L. J. C. P. 320.

As to the effect in determining the tenancy of a notice to quit which has been subsequently withdrawn, see *Taylenr* v. *Wildin*, L. R. 3 Ex. 303, 37 L. J. Ex. 173.]

If on the creation of a tenancy from year to year the parties do not use words showing that they contemplate a tenancy for two years at least, the tenancy is determinable at the end of the first as well as of any subsequent year. Doe d. Clarke v. Smaridge, 7 Q. B. 957; and as to the words which have been held to show an intention to create a tenancy at least for two

years, see Doe d. Chadborn v. Green, 9 A. & E. 658; Denn d. Jacklin v. Cartwright, 4 East, 29; R. v. Chawton, 1 Q. B. 247; [and Doe d. Monck v. Geekie, 5 Q. B. 841.

By 46 & 47 Vict. c. 61, s. 33, the Agricultural Holdings Act, 1883, it is enacted that, "Where a half-year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient, but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors." See on the construction of this and of the corresponding section of the repealed Act of 1875, Wilkinson v. Calvert, 3 C. P. D. 369; Barlow v. Teal, 15 Q. B. D. 501; 54 L. J. Q. B. 564.

By s. 54, nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

On a weekly tenancy it has been doubted whether any notice to quit is necessary; see per Cresswell, J., in Towne v. Campbell, 3 C. B. 922, citing Huffel v. Armisted, 7 C. & P. 56. But a reasonable notice is, it is apprehended, clearly necessary; and the safest plan is to give a week's notice; see Jones v. Mills, 10 C. B. N. S. 788, where Mr. Justice Williams thought that the notice should be a week's notice, but Mr. Justice Willes was not satisfied with the correctness of that view, which was not necessary for the decision. A month's notice has been held to be the proper notice on a monthly tenancy, Beamish v. Cox, 16 L. R. Ir. 270, 458. There is no objection in law to a tenancy determinable by a week's notice to quit and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods; Cornish v. Stubbs, L. R. 5 C. P. 334, 39 L. J. C. P. 202, followed by Mellor v. Watkins, L. R. 9 Q. B. 400.]

There is no doubt that a tenancy at will, strictly speaking, may still be created; Ball v. Cullimore, 5 Tyrwh. 753; [Marquis of Canden v. Batterbury, 5 C. B. N. S. 808.] It may be so by express words, Richardson v. Langridge, 4 Taunt. 128; Cudlip v. Rundle, 4 Mod. 9; R. v. Fillongley, Cald. 569. Doe d. Basto v. Cox. 11 Q. B. 122, 17 L. J. Q. B. 3. A person who holds rent-free by the permission of the owner is a tenant at will. R. v. Collett, Russ. & Ry. C. C. 498; ex. gr., a minister placed in possession by trustees for the congregation. Doe v. Jones, 10 B. & C. 718; vide tamen Wilkinson v. Malin, 2 Tyrwh. 544.

So [was] a person entering under an agreement to purchase, or for a lease, and who [had] not paid rent. See Regnart v. Porter, 7 Bing. 451; Doe v. Miller, 5 C. & P. 595; Riseley v. Ryle, 11 M. & W. 16; [Pollen v. Brewer, 7 C. B. N. S. 371]; although he [had] paid interest, Doe d. Tomes v. Chamberlain, 5 M. & W. 14. See Howard v. Shaw, 8 M. & W. 119.

On payment of rent, however, he [became] tenant from year to year. Mann v. Lovejoy, R. & M. 355. See Saunders v. Musgrove, 6 B. & C. 524; Chapman v. Towner, 6 M. & W. 100. Provided that he paid it with reference to a yearly tenancy; for as Baron Parke observes, in Braithwaite v. Hitchcock, 10 M. & W. "although the law is clearly settled that where there has been

an agreement for a lease, and an occupation without payment of rent the occupier is a mere tenant at will, yet it has been held that if he subsequently pays rent under that agreement he thereby becomes tenant from year to year. Payment of rent, indeed must be understood to mean promotive there was to a quarky holding; for in Eucletedson v. Low gridge, a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held, nevertheless, to be a tenant at will only." See also the judgment of the same learned judge in Dov d. Hull v. Word, 14 M & W. 687; and the reason is, because the payment of rent by the occupier with reference to a yearly holding, and the receipt of it by the landlord, [was] evidence of the intention of the parties that a yearly tenancy should be created.

So where a party having entered under a void lease granted by A = B paid them rent, and continued in possession after an assignment of his interest by B. to A., and paid rent to A. with notice of the assignment, this was held to be evidence of a new contract of tenancy from year to year with A. alone: Arden y Sullivan, 14 Q. B. 832

It is however only evidence | Dowd | Lord v. Critgo, 6 C. B. 98; and although in the absence of other circumstances, showing a contrary intention, it would be deemed conclusive. Bishop v. Howard, 2 B. & C. 100, yet where it appears the parties do not intend it to have that effect, the tenancy at will remains unaffected by it. Thus in the case of Dor d Bosto v. Cor. 11 Q B 122, 17 L. J. Q. B. 3, where ejectment was brought by 2 B. E. & M., mortgagees, against the defendant, mortgagor, the mortgage deed contained the following clause, "And the said W. Cox hereby agrees to become tenant to the said B. E. & M. henceforth during their will and pleasure, at and after the rate of 251. 6s. per year, payable quarterly, on the 18th September, 18th of December, 18th of March, and 18th of June:" the defendant having made default in payment of the instalments of the mortgage money and rent, the lessors distrained for four quarters' rent; afterwards they gave a week's notice to quit and brought ejectment. It was contended on behalf of the defendant that he was, under the circumstances, tenant from year to year; and that a six months' notice was requisite; the learned judge (Mr. Justice Coltman however decided that the defendant continued tenant at will, and that the notice was sufficient. The Court of Queen's Bench were of opinion that he was right, and refused a rule for a new trial. So in the case of Due d. Dixie v. Davies, 7 Exch. 89, a tenancy at will between a mortgagee and mortgagor was also held to exist notwithstanding the reservation of a yearly rent; see also Pinhorn v. Souster, 8 Exch. 763; In re Strond, 8 C. B. 502; Doc d. Prior v. Ongley, 10 C. B. 25. The Guardians of the Woodbridge Union v. The Guardians of Colneis, 13 Q. B. 269; West v. Fritche, 3 Exch. 216; [and Smith v. Widlake, 3 C. P. D. 10.

It is important to observe that the law will not imply the existence of a tenancy from year to year from the fact of payment, after entry upon the land, of sums of money described as rent, if on looking at the whole of the circumstances of the case it appears not to have been the intention of the parties to create the relation of landlord and tenant. This rule is well illustrated by the case of *The Marquis of Camelon v. Batterbury*, 5 C. B. N. S. 808. In this case a building agreement under seal had been made between the owner of a piece of land and a builder. This agreement provided for the granting of future leases, and also contained a covenant on the part of the builder that he would pay certain rents when some buildings should be erected

on the land, and leases of them should be granted, and that until the granting of the leases he would pay such yearly sums or rents as would become payable if leases had been actually granted. The contract also contained a proviso for re-entry in case any portion of the yearly sums or rents should be unpaid for twenty-one days. The builder assigned his interest under the agreement to a third person, who entered on the land, erected some buildings on it, paid the stipulated yearly sums for some time, and then assigned his interest to another. An action for use and occupation was afterwards brought, in respect of a portion of the land, by the owner of the property against the assignee of the builder. Under these circumstances the court was of opinion that neither the builder nor his assignee, had acquired any estate in the premises under the building agreement, and that no tenancy from year to year had arisen. Mr. Justice Williams, after stating that he thought that no tenancy from year to year subsisted between the plaintiff and the defendant, proceeded as follows:

"It seems to me to be clear that the building articles carefully exclude the acquisition of any estate by Elliott (the builder). It would perhaps be difficult to say that he did not become tenant at will: but beyond a tenancy at will, he clearly had no estate. What, then, was Elliott's position? He had under the articles a right to enter upon the land and devote it to the purposes thereby contemplated, and for this right he was to pay an annual sum, not as rent, but as a collateral payment until the leases should be granted, and an estate thereby acquired. It is plain, therefore, that the sum stipulated to be paid by Elliott not being payable as rent for the occupation of the land, but merely a stipulated sum payable by virtue of the agreement, so far as he was concerned there is no ground for saying that he ever paid rent in the sense of creating a tenancy. But it is contended that, when the defendant came in, the payment was to be considered as rent paid for the enjoyment of the land, and so a tenancy from year to year was created. It seems to me that there is no ground whatever for implying a tenancy from year to year in the defendant. Where a tenancy from year to year is implied from periodical payments, it is because you cannot account for the payment of the money upon any other hypothesis than that it is paid for rent, and hence the law implies a tenancy from year to year. But here there is no more reason for implying a tenancy from year to year after the defendant came in than there was when Elliott held the land. The defendant became liable to pay the money because Elliott had assigned the agreement to him, and he had agreed with Elliott to make the payments. . . . The payments which were made by him were not made in discharge of any original liability in himself, but in discharge of the liability of Elliott, against which the defendant as assignee was bound to indemnify Elliott. It is said that the defendant held upon terms different from those under which Elliott held. But that leaves the question precisely as it was before. Can you imply from the payment of the money by the defendant, that he meant to become tenant from year to year to the plaintiff? Certainly not. The payment being due to the liability of Elliott under the agreement, there is no more reason for inferring that the defendant became tenant from year to year than that Elliott became such. Then it is said, that if the defendant was tenant at will only, inasmuch as he continued tenant for a portion of the year, he ought to pay rent pro rata. Be it that he was tenant at will, he was not tenant at will on the terms of paying so much a year rent. The amount still remains a collateral sum, for which Elliott, and Elliott alone, was, in my opinion, liable under his agreement with the plaintiff:" and see Adams v. Hagger, 4 Q. B. D. 480.]

It has already been shown in the notes to Keech v. Hall, that there are certain cases in which a mortgagor in possession becomes tenant at will to the mortgagee. A vendor who remains in possession after having conveyed, is net tenan' 't will to the vendee. Few v. Jones, 13 M. & W. 13, because he is not in possission necessarily by the consent of the vendee; but it may perhaps be taid down, that wherever a person is in possession of land, in which he has no freehold estate, nor tenancy for any certain term, and which he nevertheless holds by the consent of the true owner, that person is tenant at will, and as such is liable to pay for his occupation, if beneficial; Ibbs v. Richardson, 9 A. & E. 849; Howard v. Shaw, 8 M. & W. 119; unless there be a stipulation that he shall occupy rent-free. See per Alderson, B., in Howard y. Shaw, and Winterbottom v. Ingham, 7 Q. B. 611, in which case it was held that a party remaining in possession under a contract for purchase which ultimately fails for want of title is not liable to pay for such occupation, though it be found to be beneficial, up to the time of the determination of the contract; - secus if he remain after such determination, Howard v. Shaw, supra.

On account of the peculiar origin of a tenancy from year to year, and its being still in contemplation of law a tenancy of will, it seems to have been thought by three judges, in Doe v. Wells, 10 A. & E. 427, that it would be possible to put an end to it by the parol consent of both parties, such parol consent not operating as a disclaimer, which cannot be by mere words, [Hunt v. Allgood, 10 C. B. N. S. 253; Jones v. Mills, ib., 788], nor as a surrender, which would be opposed to the Statute of Frauds, but as a determination of the will of both parties.

But until determined, the tenancy from year to year is a term which will pass to the personal representative, *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.

So tenant from year to year, demising from year to year, or for a term of years, has a reversion which enables him to distrain. Cartis v. Wheeler, Moo. & M. 493; and see Oxley v. James, 13 M. & W. 209, where tenant from year to year having demised for thirty-four years to the plaintiff, who sub-let for eighteen years and a quarter to the defendant, against whom he declared in covenant for non-repair, pursuant to the terms of the sub-lease, it was held that the plaintiff, if he could not in pleading describe his interest as an absolute term for thirty-four years (which however semble he could after its expiration), might clearly allege it to be a tenancy for thirty-four years, "provided the tenancy from year to year should so long continue."

[Formerly] if a person who had created a tenancy at will became insolvent, a vesting order [under 1 & 2 Vict. c. 110, ss. 37 & 45, repealed by 24 & 25 Vict. c. 134, s. 230] with knowledge thereof by the tenant, was a determination of the tenancy, Doe d. Davies v. Thomas, 6 Exch. 854. [Quare whether the like rule obtains under the analogous sections of the present Bankruptcy Act, 1883, see ss. 54 and 55.] But the notice to the tenant [has been thought to be] essential, as on the other hand a transfer by the tenant at will of his interest to a third person will not determine the tenancy unless notice of it is given to the landlord. Carpenter v. Colins, Yelv. 73; and Pinhorn v. Souster, 8 Exch. 763; [sed quære].

1. The Statute of Frauds.—The Statute of Frauds, 29 Car. II., chap. 3, provided that "all leases, estates, interests of free-hold, or terms of years... made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing shall have the force and effect of leases or estates at will only,... except, nevertheless, all leases not exceeding the term of three years from the mak-

ing thereof, etc.

2. In what states re-enacted. — The English Statute was in substance re-enacted in Georgia, Act of Feb. 25, 1784; Maryland, Kilty, p. 242; Alexander's British Statutes in force in Maryland, p. 508; South Carolina, R. S. 1872, ch. 93, sec. 5, ch. 98, secs. 1–4; Massachusetts, until April 1, 1863; Michigan, until Aug. 1, 1838; Missouri, until March 15, 1845; New Jersey, until Jan. 1, 1875; and Vermont, until July 1, 1840; but is nowhere now in force. With this change in legislation the importance of Rigge v. Bell and Clayton v. Blakey as authorities is greatly decreased, especially as in nearly all the states no interest in land for a longer period than one year can be created by an oral contract.

3. American statutes. — Every state and territory has a statute on the subject, prescribing when a contract, relating to the transfer of an interest in land, must be evidenced by writing,

but no two of them are alike.

Many of them declare that every contract for the sale of any interest in land except a lease for a term not longer than one year is *void*, unless in writing; Alabama, Code, sec. 1733; Colorado, Gen. Stats. sec. 1517; Georgia, Code, sec. 1950; Michigan, Howell's Ant. Stats., sec. 6179; Minnesota, Stats. p. 543; Nebraska, Com. Stats. p. 443; Nevada, Gen. Stats., sec. 2626; Wyoming, R. S. sec. 1249.

Others enact that no action shall be brought to charge any person upon any oral lease for a longer period than one year; Arizona, Code, sec. 2030; Arkansas, Dig. of Stats. secs. 3371–81; Connecticut, Gen. Stats. sec. 1366; Florida, Dig. of Laws, p. 208; Illinois, R. S. p. 740; Kentucky, Gen. Stats. p. 296; Missouri, R. S. sec. 2513; Ohio, R. S. sec. 4199; Rhode Island, Stats. p. 552; Tennessee, Code, secs. 2423; Virginia, Code, sec.

2840.

Still others simply state that a lease for a longer period than one year must be in writing; California, Code, sec. 1625.

In a few instances it is in the form of a provision that an estate for a longer period than one year cannot be created or transferred except by an instrument in writing; Dakota, Code, sec. 322; Kansas, Com. Laws, sec. 2819; Massachusetts, P. S. p. 732; Mississippi, Code, sec. 1188; Montana, Com. Stats. p. 651; New York, R. S. p. 2326.

Delaware has the peculiar wording, "no demise, except it be by deed, shall be effectual for a longer term than one year;" Laws of Del. p. 707.

Iowa prescribes that no evidence is competent to prove a demise for a longer period than one year unless it be in writing; McClain's Annotated Stats. sec. 3663, 64.

The states that have the three-year period are New Jersey, R. S. p. 444; Pennsylvania, Purden's Dig. p. 830; Indiana, R. S. sec. 4904; and North Carolina, Code, sec. 1743.

In Maine, Massachusetts, Missouri, New Hampshire, Ohio and Vermont, there is no exception; Maine, R. S. p. 838; Massachusetts, P. S. p. 732; Missouri, R. S. sec. 2513; New Hampshire, G. S. p. 407; Ohio, R. S. sec. 4199; Vermont, R. S. sec. 1922.

In Louisiana leases may be made by either written or verbal contract, but the transfer of *title* of real estate must be evidenced by writing; Code, p. 372; Rachel v. Pearsall, 8 Mart. La. 702.

- 4. When estate at will created.—In a few states and territories it is expressly stated that an oral lease for a longer period than the one specified shall create an estate at will. Among them are Arkansas, Dakota, Massachusetts, Missouri, Pennsylvania, and Vermont. Most of the statutes are silent on this point, but there seems no doubt that if the lessee is put in possession he has everywhere an estate at will, governed by the ordinary rules applicable to such holdings.
- 5. Presumptively nothing but duration of lease affected by statute. Presumptively the amount of rent to be paid, the time of payment, etc., in fact, everything except the duration, is as agreed in the oral contract; Schuyler v. Leggett, 2 Cow. 660; People v. Rickert, 8 Cow. 227; Edwards v. Clemons, 24 Wend. 480; Hollis v. Pool, 3 Met. 350; Creech v. Crockett, 5 Cush. 133; Currier v. Barker, 2 Gray 224; Norris v. Morrill,

40 N. H. 395; Lockwood v. Lockwood, 22 Conn. 425; Crommelin v. Thiess, 31 Ala. 412; Craske v. Christian Union, 17 Hun 319; Reeder v. Sayre, 70 N. Y. 180; Nash v. Berkmeir, 83 Ind. 536. This presumption, however, may be rebutted by the acts of the parties; Prindle v. Anderson, 19 Wend. 391.

6. Expansion of estate at will. — In those states where the statute excepts leases for a year or greater period, Clayton v. Blakey is generally followed, and a lease at will, arising from non-compliance with the statute, may be expanded by the acts of the parties into one from month to month or year to year, their acts being construed just as if no oral lease had existed; McDowell v. Simpson, 3 Watts 135; People v. Rickert, 8 Cow. 227; Drake v. Newton, 3 Zab. 111; Ridgley v. Stillwell, 28 Mo. 400; Lockwood v. Lockwood, 22 Conn. 425; Grant v. Ramsey, 7 Ohio St. 157; Craske v. Christian Union, 17 Hun 319; Reeder v. Sayre, 70 N. Y. 180; Nash v. Berkmeir, 83 Ind. 536; Koplitz v. Gustavus, 48 Wis. 48; Thurber v. Dwyer, 10 R. I. 355.

In most of those states, however, where there is no exception, it is held that such a lease at will cannot be thus expanded; Ellis v. Paige, 1 Pick. 45; Hollis v. Pool, 3 Met. 350; Kelly v. Waite, 12 Met. 300; Davis v. Thompson, 13 Me. 214; Whitney v. Swett, 22 N. H. 10. There seems no sound reason for such decision, and in Vermont, where such a statute exists, the courts have adopted the general rule; Barlow v. Wainwright, 22 Vt. 88. The court remark: "The words of the statute are satisfied by holding that the estate created in the present case was in the first instance an estate at will, and only an estate at will, and yet that it enured like other estates at will and had the incidents common to an estate at will, one of which is its convertability into a holding from year to year by the payment of rent."

- 7. Surrender.—As regards the necessity of a writing, the same rules apply to the surrender of a lease as to its creation, unless the surrender be by operation of law; Bailey v. Wells, 8 Wis. 141; Rowan v. Lytle, 11 Wend. 621; Schieffelin v. Carpenter, 15 Wend. 400; Hesseltine v. Seavey, 16 Me. 212; M'Kinney v. Reader, 7 Watts 123; Van Dekar v. Reeves, 40 Hun 430.
- 8. Construction of various statutes. When the statute declares that a parol contract is "void," the courts have held that "void" means voidable, and the defence is waived if not

pleaded; Cooper v. Hornsby, 71 Ala. 62; Comer v. Sheehan, 74 Ala. 452. The same has been held, as between the parties, in Iowa, where the lease is required to be *proved* in writing; Nordyke v. Woolen Mills, 5 N. W. Rep. 725.

An oral lease for three years, with a right of the lessor to terminate it at any time upon four months' notice was held void under the Minnesota Statute as being for a term "exceeding one year;" Evans r. Winona Lumber Co., 30 Minn. 515. The wording of the different American statutes is so different that it is not safe to rely upon the decisions under one as authorities under another, without very careful comparison.

GEORGE v. CLAGETT.

TRINITY. - 37 G. 3.

[REPORTED 7 T. R. 359.]

If a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

On the trial of this action, which was assumpsit for goods sold and delivered to the amount of 142l. 1s. 9d., before Lord Kenyon at the Guildhall Sittings, the case appeared to be this: The plaintiff, a clothier at Frome, employed Messrs. Rich and Heapy in London, Blackwellhall factors, as his factors under a commission del credere, who, besides acting as factors, bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months' credit, and were allowed two and a half per cent. On the 30th of September, 1795, Delvalle, a tobacco broker, and who had been in habits of dealing with the defendants, bought several parcels of tobacco of them, and gave them in payment a bill of exchange for 11981, 16s., drawn by one Fisher on Rich and Heapy, on the 24th of September, 1795, payable two months after date to J. Stafford, who indorsed to Delvalle, who indorsed it over to the defendants, it having been previously accepted by Rich and Heapy. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of Rich and Heapy, amounting to 1237l. 18s. 3d. at twelve months' credit; the goods were taken out of one general mass in Rich and Heapy's Warehouse; Rich and Heapy made out a bill of parcels

for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich and Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich and Heapy for certain cloths specified, part of the above, amounting to 1421. 1s. 9d., they having been his property, and having been sold on his account by Rich and Heapy on commission. The question was, Whether the defendants were or were not entitled to set off their demand against Rich and Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord Kenyon was of opinion that they were, as well on principle as on the authority of Rabone v. Williams (a); and a verdict was accordingly found for the defendants.

A rule was obtained, calling on the defendants to show cause why the verdict should not be set aside, and a new trial had, on the authority of the case of *Estcott* v. *Milward*, Co. Bank. Laws, 236.

Gibbs and Giles were now to have shown cause against that rule: but

Erskine and Walton were called upon to support it. They relied on the cases of Scrimshire v. Alderton (b), and Estcott v. Milward, as reported in Co. Bank. Laws, to show that under the circumstances of this case the principal might resort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

(a) Rahone, jun., v. Williams, Midx. Sittings after Mich. 1785; which was thus stated: - Action for the value of goods sold to the defendant by means of the house of Rabone, sen., and Co., at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co., the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co., the factors, and not by the plaintiff. Lord Mansfield, Ch. J. - " Where a factor, dealing for a principal, but concealing that principal, delivers

goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." Upon this opinion, the rest, being a mere matter of account, was referred. In Bayley v. Morley, London Sittings after Mich. 1788. Lord Kenyon recognised the law of this case.

(b) 2 Str. 1182.

But a more accurate note of the case of *Estcott* v. *Milward* (a) having now been obtained from Mr. J. *Buller*, before whom that case was tried and read:

The *Court* were clearly of opinion that the directions given by the learned judge on the trial of this cause were right, and that this case was not distinguishable from that of *Rabone* v. *Williams*. Therefore they

Discharged the rule (b).

[The effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), has been very much to enlarge the rights of defendants as regards set-off. A further reference to the provisions of that Act will be found at the conclusion of this note.] The decision in the principal case, however, too clearly results from principles of natural equity to need much discussion or explanation. It has ever since been followed. See Coates v. Lewes, 1 Camp. 444; Blackburn v. Scholes, 2 Camp. 343; Carr v. Hinchliff, 4 B. & C. 551; Taylor v. Kymer, 3 B & Ad. 334; Bastable v. Poole, 5 Tyrwh. 111; Purchell v. Salter, 9 Dowl. 517; S. C. 1 Q. B. 197; [Wilson v. Gabriel, 4 B. & S. 243; Kaltenbach

- (a) London Sittings after Mich. 1783. Action for goods sold. The goods were sold by Farrar, a corn factor, who gave no account of the sale to the plaintiff, nor made any entry of it in his books. He was insolvent for some time before, and avoided all dealing for a month, had desired that there might be no buying in his name, and had not dealt with the defendant for a year before, but was then in his debt. There was a verdict for the plaintiff on the ground of fraud.
- (b) The same point was also ruled by Lord Kenyon in Stracey, Ross, and others v. Deey, London Sittings after Mich. 1789. Assumpsit for goods sold; pleas non assumpsit and a set-off. The plaintiff's jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker, and being indebted for

grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back, and holding out Ross as the only person concerned in the trade. Lord Kenyon, Ch. J., was of opinion, that as the defendant had a good defence by way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by Ross. - Verdict for the defendant. [S. C. 2 Esp. 469 n.]

v. Levis, 10 App. Cas. 617; 55 L. J. Ch. 58; and Sims v. Bond, 5 B. & Ad. 393, where the rule is thus expressed by the Lord C. J., delivering the judgment of the court: — It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent, or the principal, may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party." (See further on this subject in the notes to Paterson v. Gambisequi, Addison v. Gambisequi, and Thomson v. Discoupert, post.)

However, the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal, but with an agent, the reason of the above rule ceases, and then cessante ration, cessal lex.

Thus in Baring v. Carri, 2 B & A. 137, Coles and Co., who were brokers, and also merchants, sold to Corrie and Co., in their own names, sugars belonging to Baring Brothers and Co., who brought this action for their price. The true nature of the contract was entered by Coles and Co. in their broker's book, which the defendants might, if they pleased, have seen. had Coles and Co. the possession of the sugars, which were lying in the W. I. Docks, whence, by the usage of the docks, they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set off against the plaintiffs' demand for the price of the goods, a debt due to them from Coles and Co. "It is to be observed," said Bayley, J., "that the plaintiffs did not trust the brokers with either the muniments of title, or the possession of the goods, as was done in both the cases of Robone v. Williams, and George v. Clagett. There is another circumstance by which the defendants might easily have ascertained whether Coles and Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that if the defendants had asked to see the book, they would instantly have discovered whether Coles and Co. acted as brokers or not. I therefore think, that the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods so as to impose on the defendants; that the defendants were not imposed on; and even supposing that they were, they must have been guilty of gross negligence. . . . I cannot think that the defendants believed, when they bought the goods, that Coles and Co. sold them on their own account; and if not, they can have no defence to this action." See further Maanss v. Henderson, 1 East, 335; Moore v. Clementson, 2 Camp. 22. [Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, and Cooke v. Eshelby, H. L., 15th March, 1887, where the defendants, though they dealt with the broker as principal, had no belief one way or the other whether he was acting for himself or for another person in the transaction, and were therefore debarred from setting off sums due to them from the broker against the claim of the principal.]

In the case of Warner v. M'Kay, 1 M. & W. 595, it was held by the Court of Exchequer, that a purchaser might set off payments made to a factor, if he believed that the factor had a right to sell, and did sell, to repay himself advances; but see the observations on this case in the judgment in Smart v. Sandars, 3 C. B. 399, and per Cresswell, J., in Fish v. Kempton, 7 C. B. 694,

where it was held that knowledge, by the purchaser of goods, that the vendor sold them as factor disentitled him to set off a debt due by such factor in an action by the principal. The set-off, however, to be available, need not exist at the time of the sale: if it arise before notice of the real ownership it is sufficient. See the observations of Parke, B., in Salter v. Purchell, 1 Q. B. 213; and in Stracey, Ross, and others v. Deey, ante, p. 132, note (c), it will be seen that the debt which was set off became due after the sale of the goods, to the partner who was allowed to act as apparent owner of the goods sold.

[In order to make a valid defence within the rule laid down in the principal case, it is necessary to show, that the contract was made with a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own in his own name, as principal, with the authority of the plaintiff; that the defendant dealt with him as, and believed him to be, the principal in the transaction; and that before the defendant was undeceived in that respect, the set-off accrued. See the judgment of the Court of Common Pleas in Semenza v. Brinsley, 18 C. B. N. S. 467, which was decided on demurrer. But constructive authority is sufficient; therefore if the goods be intrusted to a factor, who has by custom an implied authority to sell in his own name, the right of set-off will not be defeated by showing a private prohibition from the principal to the factor to sell in his own name. Ex parte Dison, 4 Ch. D. 133. Under the late system of pleading, means of knowledge need not have been expressly negatived in the plea, Borries v. The Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3. And where the purchaser's agent knows that the seller is only an agent, there can be no set-off, although the purchaser himself is not informed of the real facts. Dresser v. Norwood, 17 C. B. N. S. 466.

In Turner v. Thomas, L. R. 6 C. P. 610, it was sought to extend the principle of George v. Clayett to a case in which the claim was for unliquidated damages. The action was by seller against buyer upon a contract for the purchase of goods to arrive, and the agent, with whom the defendant had dealt in the belief that he was the owner of the goods sold, having become bankrupt, the defendant sought to avail himself against the principal of a mutual credit with the agent. The court disallowed the set-off on the ground that it could not be maintained against a claim for unliquidated damages, and that the defence set up was not a defence against the factor, but only a special mode of settling account with his assignees upon his bankruptcy, and consequently did not come within the principle of George v. Clayett. Query as to the effect of Order XIX. Rule 3, under the Judicature Acts upon cases of this class.]

Where the goods are sold by an agent as his own, the buyer knowing nothing at the time of his principal, and the action is brought in the name of the agent, the defendant [could not before the introduction of equitable defences have] set off [at law] a debt due to him from the principal. For in this case there is no concealment which can be in any way injurious to the buyer, nor is his position at all altered by the mode in which the action is brought: and the statutes of set-off only apply to cases in which the mutual debts are due from the plaintiff, and from the defendant: see the notes to Thomson v. Davenport, post, and the judgment of the court in Isberg v. Bowden, 8 Exch. 852.

[Still courts of law have frequently allowed pleas of set-off on equitable grounds in cases subsequent to *Isberg v. Bowden*, on allegations similar to those alleged in the plea in that case, viz., that the plaintiff was suing as a

bare trustee for a third person against whom the defendant had a set-off, and had no beneficial interest himself in the sum sought to be recovered see Agra and Masternata's Beak v. Leighton, L. R. 2 Ex. 56; Theoriton v. Magnard, L. R. 10 C. P. 695, 44 L. J. C. P. 382; Holmes v. Lutton, 5 E. & B. 65, and Cochrimo v. Green, 9 C. B. N. S. 448; 28 L. J. C. P. 3, thus practically recurring to the view taken in earlier decisions at law, see Bottomley v. Brook, 1 T. R. 621; Kudye v. Birch, ibid, 622. It would seem, however, that the rule of equity has been stated too broadly in some of the cases at law, notably in Cochrimo v. Green, 9 C. B. N. S. 448; 30 L. J. C. P. 97. For to found such an equity it is not enough, as appears to have been assumed in that case, to show that the plaintiff is a bare trustee; there must be independent grounds giving the Court of Equity jurisdiction and calling for its intervention to enlarge the statutable right of set-off. See the judgment of Jessel, M. R. in Le parte Vagos, L. R. 20 Lq. 29.

Similar in principle to the decision in *George v. Clagett* is that of *Stackwood v. Dun v. 3* Q. B. 822, where it was held that in an action of *indeletatus assumpsit* against A. he might plead that the promises were made by himself and B. jointly, and that they had a set-off. So also the case of a partner allowed by the firm to appear as the sole owner of partnership property. See *Gordon v. Ellis*, 2 C. B. 821 [and compare *Spurr v. Cass*, L. R. 5 Q. B. 656].

The decision in Stackward v. Dann, besides being obviously just, is in substance consistent with the language of the statutes of set-off 2 (eco. 2, c. 22, and 8 Geo. 2, c. 24), which give the statutory right of set-off in cases in which there are mutual debts "between the planets!" and defendent". See the judgment in Islang v. Bow len, whi sup

[The provisions of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which, with an extended right of joining parties as plaintiffs in actions, gave an extended right of set-off to defendants, have been still further enlarged by the Judicature Act, 1873, and the rules made pursuant to the Judicature Act, 1875.

By these enactments it is competent for a defendant to set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether sounding in damages or not, and the court and every judge thereof is empowered to grant to any defendant, in respect of any equitable estate or right, as well as any legal estate or right claimed by him, all such relief as he shall have properly claimed by his pleading, and as the said court or any judge thereof might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff. There are also provisions enabling the courts to give a remedy or relief to defendants who claim to have rights over against third parties. See Judicature Act, 1873, s. 24, and R. S. C. Order XIX., r. 3; Order XVI., r. 48, et seq.

A RECENT carefully considered opinion of the supreme court of the state of New York in the case of Nichols r. Martin, 35 Hun 168, is valuable not only as illustrating the tendency of most American courts in dealing with cases analogous to the principal case, but also because treating incidentally of many of the questions apt to arise in cases of this character.

In Nichols v. Martin, one Isaac Depuy sold and delivered to the defendants a quantity of wheat, and received in payment their promissory note for the price of the wheat payable to his order in sixty days. Thereafter, but before the maturity of the note, the defendants purchased for the trifling sum of \$5 an overdue note made by Depuy to a third party for a sum in excess of the amount of the note given by them to Depuy. As a matter of fact, the wheat sold by Depuy belonged to his wife, and was sold by him as her agent; but he had the possession of the same, and defendants at the time of purchasing supposed he was the real owner. At the time of the maturity of the note given by the defendants to Depuy, the latter informed the former that the wheat belonged to his wife, but they refused to pay for the same, claiming the right to set-off the amount of his note held by them. In an action brought against the defendants by an assignee of the note, the general term held that in no event were the defendants entitled to a set-off for a greater amount than the \$5 actually paid by them for the note. The court say: "This rule invoked in support of the defence is quite well defined by authority, and is a somewhat qualified one based upon principles of natural equity. . . . In all the cases before cited, and all to which attention has been called, the debtor's claims against the agent, which were allowed to be set off by the purchaser as against the principal, existed at the time of the purchase, or were created by dealings between the purchaser and the agent at and during the time that he was supposed to be the principal in the transaction of the sale. And the equitable principle applied in support of this right of the purchaser is that where one of two innocent persons must suffer, the loss should fall on him who has given the opportunity to cause it. It is not in its purpose unlike the doctrine which supports estoppel in pais, although not dependent upon the same circumstances. . . . They should not, in view of the equitable rule which gives relief, be permitted to speculate on his [the principal's] misfortune."

The rule of law laid down in Nichols v. Martin is significant as indicating a desire of American courts to limit somewhat the application of the doctrine of George v. Clagett, or at least to keep that doctrine within its original limits. That the decision in Nichols v. Martin is fair and equitable seems beyond question, yet it is by no means certain that the case would be fol-

lowed in other jurisdictions. If a court held that the only effect of the principle established by George v. Clagett is that one dealing in good faith with a factor or agent having possession of the goods of another, with that other's consent, is to be protected against loss, occasioned by his mistaken belief that such factor or agent is the real owner, then Nichols v. Martin should be followed. But if the scope of George r. Clagett is regarded as wider than the reason for the decision, the opinion of the New York supreme court would very likely not obtain. In fact the general term of the Court of Common Pleas of New York city, a court with a jurisdiction practically co-ordinate with the supreme court of that state, have laid down principles in conflict with the rule of Nichols v. Martin, in the case of Bannerman v. Quaekenbush, 11 Daly 529. In Bannerman v. Quackenbush, the defendants, desiring to purchase goods from a certain company, bought a promissory note of that company part due, paying for it an amount much less than the face, intending to use it for the payment of the goods, and ordered the goods, promising to pay cash for them. The company had previously sold all its goods of this nature to the plaintiff, but he agreed with the company to fill the order and allow the company a commission therefor. The company delivered the plaintiff's goods to the defendants with a bill of lading for the same in the company's name, and the defendants supposed the goods were the company's. Defendants obtained possession without paying cash, on the pretext that they wished before paying for them to obtain their pay from the party for whom they were purchasing. Later, when payment was demanded, defendants tendered the company's overdue note in part payment. The learned justice delivering the opinion of the Court of Common Pleas says: "The off-set was not one arising out of any transactions between the defendants and the Renz Hardware Company, but the defendants, after they had obtained an order for a certain quantity of an article which that company manufactured, and from whom they meant to purchase it, went and bought the depreciated paper of the company at the enormous discount of 79 per cent., that they might make \$367 out of an order for goods for which they were to pay but \$522.... But notwithstanding these circumstances, I think upon the authorities that if the defendants had the right to assume when they purchased the goods that the company was the owner of them,

they had the right in this action to set-off the note a valid demand which they had against the company." This is certainly carrying the doctrine of George v. Clagett far further than any other decision either in England or America has gone, and the result reached seems harsh and inequitable. It is certainly a perversion of the spirit of the rule of George v. Clagett, which was to protect an innocent outsider whom a principal had misled by conferring apparent ownership on his factor or agent. It was not intended to be used as a shield, so as to make every right of the real owner subordinate to the right of the third party dealing with such agent, to gain every possible advantage from the transaction. Yet it may be that this decision is but a logical extension of doctrine of the undisclosed principal, that the principal is affected with all the attendant burdens in the transaction, and is chargeable with everything that could be charged against the agent.

Principle of George v. Clagett followed in America. — That the general principle of law enunciated in George v. Clagett prevails in America, is axiomatic. It is only in the application of the rule to special cases that American decisions sometimes come into seeming conflict. That a purchaser from an agent or factor, who has apparent ownership and possession of goods really belonging to an unknown principal, with the latter's assent, buying in ignorance of the real ownership and without circumstances to awaken his inquiry as to it, may set-off against the demand of the principal any claims or demands he has against such factor or agent, is established by the following cases: Gardner v. Allen, 6 Ala. 187; Stinon v. Gould, 74 Ill. 80; Traub v. Milliken, 57 Me. 63; Baltimore Tar Man. Co. v. Fletcher, 17 Rep. 557 (Court of Appeals of Maryland); Huntington v. Knox, 7 Cush. 371; Locke v. Lewis, 124 Mass. 1; Dean v. Plunkett, 136 Mass. 195; Hickman v. Craig, 6 Mo. Ap. 583; Pratt v. Collins, 20 Hun 127; McLachlin v. Brett, 105 N. Y. 391; Nichols v. Martin, ubi supra; Bannerman v. Quackenbush, ubi supra; Frame v. William Penn Coal Company, 97 Pa. St. 309; Conyers v. Magrath, 4 McCord 394.

Knowledge of the purchaser of the real facts will defeat his right of set-off. — The rule in George v. Clagett does not obtain where the purchaser knows the agent is not the owner, or where circumstances are brought to his knowledge, by investigating which he might have ascertained that the agent was not the

owner; Bernshouse v. Abbott, 16 Vroom 531; Stewart v. Woodward, 50 Vt. 81; Wright v. Cabot, 89 N. Y. 574; Crosby v. Hill, 15 Rep. 758 (Supreme Court of Ohio); Dunn v. Wright, 51 Barb. 250; Miller v. Lea, 35 Md. 396, where Alvey, J., says, "Hence if the character of the selling is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debt and availing himself of a set-off is bound to inquire in what character he acts in the particular transaction; and if he chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off."

Mere public rumor, or matters known to other persons, but not brought to the knowledge of the purchaser, will not defeat his right of set-off. Pratt v. Collins, 20 Hun 127.

Partners entrusting firm property to one partner liable to have a bonâ fide purchaser set-off the indebtedness of the individual partner.—If a partnership so entrusts goods belonging to it to a partner as agent, so as to enable him to deal with them as his own, a person who in ignorance of his agency buys such goods of him, would be allowed the right of paying for them in the manner agreed upon by the partner, and would have the right to set-off a debt of that partner to him; Dean v. Plunkett, 136 Mass. 195.

Contrary American decisions.—The cases of Conable v. Lynch, 45 Iowa 84, and Brown v. Morris, 83 N. C. 251, while not professing to disregard the principle of George v. Clagett, undoubtedly do practically nullify its effect and must be regarded as contrary to the authorities.

Can the rule be invoked in executory contracts?—A late decision of the Court of Appeals of the state of New York lays down the rule that where the contract is executory, and before the goods are delivered to the purchaser, he is informed that they are not the property of the party with whom he contracted but belong to a third person; then by receiving a delivery under the circumstances the purchaser waives all right to set-off an indebtedness of the agent to him in an action for the purchase price brought against him by the real owner; McLachlin v. Brett, 105 N. Y. 391. The opinion of Mr. Justice Finch turns on the fact that in this case, when receiving the goods bought, the purchaser was not acting in the dark as to the real

ownership, and that until such acceptance no right of set-off accrued. And the conclusion of the court is sound and just, provided the purchaser had the option to refuse to receive the goods on ascertaining the real facts as to their ownership. There is a strong dictum of the court that he would have such an option. But that question is not apparently as free from doubt as the court seemed to regard it.

Right of set-off against the agent of a debt due the defendant by his principal. — In Young v. Thurber, 91 N. Y. 390, we have the circumstances of the principal case reversed. In this case the assignee of the agent sued the defendants for certain merchandise sold them by said agent. The goods belonged to an incorporated company which was insolvent at the time, but at the time of the purchase the defendants supposed the goods were the agent's. The defendants attempted to set-off certain claims of this company owing them, attempting to invoke the rule in George v. Clagett as an equitable reason for the allowance of such set-off. The court disallowed the set-off, but rested their decision on the fact that the arrangement between the agent and the company was one by which the former made advances to the latter for the goods consigned, and was to reimburse himself out of the proceeds of the sale, and that, under such arrangement, he did make advances exceeding the value of the goods consigned. There is no need to say the decision of the particular case was right. The defendants had not contracted with reference to a possibility of setting off their claim against the principal, for they then did not know that principal had any interest in the property. Whereas, the agent had sold with the express purpose of indemnifying himself from the proceeds against the money he had advanced for that principal. But if we suppose a case where no equities remained to be adjusted between the agent and the principal, would a purchaser's right of set-off of a claim due him from the principal then attach in a suit brought by the agent? Although he did not purchase expecting to exercise such a right, so that the principal cannot be said to have misled him, as in George v. Clagett, yet the set-off is, it would seem, allowable. The real party in interest is the principal, -a party indebted to the defendant. Had that principal himself been the actor in the suit, the right of set-off would, of course, have existed. Because the plaintiff happens to be his agent the principal should not be

permitted to avoid the legal consequences of the state of accounts between the purchaser and himself. This correlative right of the purchaser in these cases to set-off the debt of the principal in a suit brought by the agent is maintained by a writer of the highest authority. See Story on Agency, 9th ed. \$\$ 404, 405, 407; and see, also, the remarks of Collier, C. J., in the case of Gardner v. Allen, 6 Ala. 187. "The authorities cited very fully show that it is quite immaterial whether the principal or his agent is the plaintiff. If the latter suc, the defendant may avail himself of any claim which he has against the former, or if the former be the actor in the suit the purchaser may set-off any claim which he has against the latter, if he purchased under a just belief authorized by the facts that the agent was the real owner." And it will be well in this connection to consider the case; Hurlbert r. The Pacific Insurance Co., 2 Sumn. 471, as indicating how fully the idea of the real party in interest is imbedded in our law. In that case, where an agent had effected insurance for the benefit of whom it may concern, and brought a suit in his own name on the policy, the company was not allowed to set-off the agent's own debt to it. And see, also, for the same purpose, Royce v. Barnes, 11 Met. 276, a case in point as showing the disposition made of cases where the agent sues.

Agent in such case if sued cannot set-off a debt due his principal by the third party. - We have thus far considered the cases where the principal or the agent or factor is the moving party in the litigation. Before closing the subject it will be well very briefly to see what rights of set-off, if any, they may have against such third party when sued by him. Suppose in a case like George v. Clagett the factor or agent had been the purchaser instead of the seller. If sued by the seller for the purchase price, he could of course set-off any claims he had against the seller. Could be set-off a claim his principal, for whom he purchased, had against the seller? Certainly, if his principal assented, there would be no objection on principles of equity, and it would seem a proper way to adjust the equities between the parties. The seller is here allowed by the law to charge one with an obligation which in truth was the obligation of another, and it is no injustice to allow set-off against his claim a valid indebtedness of the real party to the sale, provided that party agrees. The authority, however, is apparently the other

way; Waterman on Set-off, § 52; Forney v. Shipp, 4 N. C. 527; but see Story on Agency, 9th ed. § 411, and note 7.

Can principal when sued by third party set-off a debt due his agent? — Where a principal in such a case is sued, he of course would not be permitted to set-off a debt due by that third party to his agent, whom he had clothed with such apparent possession, for the very essence of set-off, mutuality, is wanting; Waterman on Set-off, § 52; Carman v. Garrison, 13 Pa. St. 158. But where a debt was really due to him, although nominally due his agent, he would undoubtedly have the right to set it off. See Talcott v. Smith, 142 Mass. 542.

Principal cannot set-off debt of broker to him. — Lastly, a principal is not permitted to set-off a debt due to him from his own broker, against the demand of one with whom he has contracted for the purchase of goods through the medium of the broker; Waterman on Set-off, p. 328; Dunn v. Wright, 51 Barb. 244.

SMITH v. HODSON.

HIL. 31 G. 3, B. R.

[REPORTED 4 T. R. 211.]

If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods, in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to a set-off.

Assumpsit for goods sold and delivered to the defendant by the bankrupts, before, and also by the assignees since, the bankruptcy. Pleas non assumpsit, and a tender of 1311. 7s. 6d., which the plaintiffs took out of court. There was also a set-off. At the trial at Guildhall before Lord Kenyon, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:—

In August, 1787, Lewis and Potter sold goods to the defendant to the amount of 42l., and on the 4th of March, 1788, they drew a bill on him at two months, for 442l., payable to their own order, although at that time he was indebted to them in 42l. only; which bill the defendant accepted. Lewis and Potter made the following entry in their books: "4th of March, 1788, received from James Hodson an acceptance, due 7th of May, 442l. to bills and notes; to provide 400l." On 26th

April several bills were refused payment, by Lewis and Potter, some of which were presented by bankers on behalf of the indorsees. On the 28th April, 1788, the defendant went to the house of Lewis and Potter, and bought goods to the amount of 5311. 7s. 6d., which were sent to him with a bill of parcels the same day; the goods were sold to the defendant at six months' credit. On the 29th of April, 1788, Lewis and Potter committed acts of bankruptcy. On the 9th of May the commission issued, and they were duly declared bankrupts, and the plaintiffs chosen assignees of their estate and effects. The bill for 4421. drawn by the bankrupts, and accepted by the defendant, became due the 7th of May, 1788; the defendant did not pay it on that day, but in September following paid to Gibson and Johnson, the holders thereof, 2001. on account of the bill; and in October following, before the six months' credit upon the goods was expired, he paid the residue with interest. The jury thought the bankrupts gave an undue preference to the defendant in the sale: and gave a verdict for the plaintiffs, damages 400l. (a). The questions for the opinion of the court are, 1st, Whether the plaintiffs can support this action for the price of the goods? 2ndly, If they can support this action, whether the defendant cannot set off against it the money paid by him on the above-mentioned bill of 442l.

Russell, for the plaintiffs, was desired by the court to confine himself to the second point, as they entertained no doubt upon the first. As to which he contended that though the sale were good to charge the defendant in this action, yet he was not entitled to support his set-off under the 5 Geo. 2, c. 30, s. 28 (b). The words which will be relied on are mutual credit: but they

- (a) A fraudulent preference may be by way of sale. See Cook v. Caldecott, 1 M. & M. 522; Ward v. Clark, ib. 499; Devas v. Venables, 3 Bing. N. C. 400; Cash v. Young, 2 B. & C. 413. But in Lee v. Hart [10 Exch. 555, 11 Exch. 880], where the sale was real and to a person not a creditor, though at a gross undervalue and by an insolvent trader, the court doubted whether it could be deemed an act of bankruptcy.
- (b) Which enacted, that where "there hath been mutual credit given by the bankrupt and any other per-

son, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, &c., shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." [The corresponding enactment in the 46 & 47 Vict' c. 52, is contained in s. 38.]

were by no means intended to be used in so extensive a sense as the one now put on them by the defendant. The giving of eredit is merely giving a future day of payment for a pre-existing debt; and to entitle a defendant to set it off, it must exist previous to the act of bankruptey. As, where goods are sold to be paid for at a future day, the vendee becomes a debtor for the value upon the delivery, though payment cannot be exacted from him till the day arrives; in the meantime the yendor is his creditor to that amount; and in that sense only is the word eredit to be understood in the act. This appears further from the subsequent words of the statute, for the commissioners are directed to state the account between the parties and claim or pay only so much as shall appear due on the balance of such account. In order, therefore, for the party to set off any demand, it must be such as may be made an item in the account, and either certain or reducible to a certainty at the time of the act of bankruptcy committed. The act itself says, that the balance of the account is to be made appear, "on setting such debts against one another;" which plainly shows that nothing more was meant by the word eredits than such debts as were payable at a future day. Then how does the statute apply to this case? There was no debt existing between the bankrupts and the defendant at the time of the bankruptcy; nor was it certain there ever would be one: for, in case of the defendant's bankruptcy or refusal to pay, the holder might have proceeded against the estate of the drawers, and recovered the amount; and that, perhaps, after the defendant's acceptance had been admitted as an item of account between him and the bankrupts; and, at all events, no debt could arise till after payment by the defendant, which was long after the bankruptcy, and therefore could not be set off; for at the time the bill was outstanding in the hands of third persons, and was therefore the subject of mutual credit, if at all, between them and the bankrupts. But in Groome's Case (a), Lord Hardwicke was clearly of opinion that a debt arising on a contingency after the bankruptcy could not be set off; and it has been determined, that though a note indorsed after an act of bankruptcy may be proved under a commission against the drawer (b), yet it cannot be set off against an action by his assignees (c). The cases Ex parte Deeze (d), and

M. & W. 30.

⁽a) 1 Atk. 119.

vide tamen 6 G. 4, c. 16, s. 50, and 3

⁽b) Ex parte Thomas, 1 Atk. 73.

⁽c) Marsh v. Chambers, 2 Str. 1234;

⁽d) 1 Atk. 228.

Ex parte French (a), assignee of Cox v. Fenn (b), were all of them cases where the bankrupts were actually indebted to the defendants before the bankruptcies, in the sums which they set off against the demands of the assignees; which differs them materially from the present; but even supposing this were such a demand as could in a fair transaction be set off in a court of law under the statute, yet it cannot avail the defendant in this case, where the whole is vitiated by fraud. It therefore becomes material to examine what part of the transaction may be substantiated, and what is void. There is no fraud in the mere act of sale; and the defendant must be bound by that so far as he made himself liable for the amount of the goods; that would have been the case had the sale been made to a person who was no creditor of the bankrupts; but the objection arises to the fraudulent use now attempted to be made of the sale. No party is entitled to set off a demand against the assignees of a bankrupt, for which he could not have maintained an action, or which he could not have proved under a commission. Now, if the defendant could not have done either in the present instance before the bankruptcy, he shall not be permitted to recover the amount indirectly in this manner; for that would be to permit him to avail himself of his own fraud.

Gibbs, for the defendant, insisted first, That if the whole were to be considered as a bonâ fide transaction, the defendant was entitled to set off the sum paid under his acceptance; and 2ndly, That the finding of the jury, as to the undue preference, could not vary the case in favour of the plaintiffs in this action. The first question depends on the stat. 5 Geo. 2, c. 30, s. 28; the true construction of which is, that wherever there is mutual credit between the bankrupt and another person before the bankruptcy, the debts may be set off against each other, although one of them may accrue after the bankruptcy, and although that one debt could not form an item of an account, so as to enable the bankrupt and such other person to strike a balance. The plaintiff's argument, That nothing can be set off under the statute, but that which may form an item of an account at the time of the bankruptcy, and the payment of which is only postponed for a time, directly militates against the decision of French v. Fenn. If that case be law, the construction now attempted to be put on this statute by the plaintiff's counsel cannot prevail. In that case Fenn owed nothing to Cox previous to the bankruptcy; so here Lewis and Potter owed Hodson nothing previous to their bankruptcy; but Fenn had been intrusted by Cox with that upon which he probably would become his debtor, namely, the sale of the jewels, in which Cox was interested one-third part; so Lewis and Potter had been intrusted by Hodson with that upon which they probably would become his debtors, se. with his acceptance for 4421, he having effects to the amount of 42%, only; there Fenn, upon the credit of the jewels intrusted to him, trusted Cox on another account; so here Lewis and Potter, on credit of the acceptance intrusted to them, trusted Hodson on another account, namely, for the goods in question; there, after the bankruptcy of Cox, Fenn received a sum of money upon the sale of the jewels intrusted to him, which became due to Cox's estate; so here, after the bankruptcy, Hodson paid a sum of money upon the acceptances intrusted to them, for which he has a claim upon their estate. In that case the court allowed the set-off, and yet at the time of Cox's bankruptcy, no balance could have been struck between the parties, because the defendant's claim arose from the produce of the pearls afterwards. What that produce would be, could not be known at the time of the bankruptcy, and consequently could not then form an item in an account between the parties. Secondly, The finding of the jury, as to the undue preference, is either nugatory as to the plaintiffs, or it operates as a ground of nonsuit. The plaintiffs have an option either to affirm or disaffirm the contract: if the former, the defendant is entitled to set off his demand; if the latter, though the plaintiffs might recover in trover, they cannot maintain this action. The jury found that there was a fraud in the sale; the plaintiffs cannot therefore contend that the fraud is confined to the use made of the sale. If the defendant had obtained his defence by fraud, it would not have availed; but it does not follow that, because there was a fraud in the sale of goods from the bankrupt to the defendant, the latter shall not set off a cross demand against the price of the goods. The fraud (if any) was in the sale of the goods; and the effect which it has is this (a), viz. that the bankrupt conveyed no property in the goods to the defendant, and that it was a naked delivery; if so, the plaintiffs should bring trover, not assumpsit.

⁽a) Cooke, B. L. 2nd ed.

Russell in reply. — With respect to the case of French v. Fenn, which seems to have been principally relied on by the other side, there are two very material distinctions between that and the present case; there did exist mutual debts between the parties in that case, though the precise amount was not actually ascertained at the time of the bankruptcy, but still it was capable of being reduced to a certainty at any time by the sale of the jewels; and if Fenn had become a bankrupt instead of Cox, it cannot be denied but that Cox might have come in under Fenn's commission for a third of the value of those jewels. Again: In that case the jewels were in the hands of the party between whom and the bankrupt the account was to be settled, and the mutual debts and credits allowed; whereas here the acceptance was in the hands of third persons at the time of the bankruptcy, without any certainty that it would ever be discharged by the defendant.

Cur adv. vult.

Lord Kenyon, C. J., now delivered the opinion of the court. His lordship, after stating the facts, said, We have considered this case, and are of opinion that the defendant has made a sufficient defence against the action in its present form, and consequently that a judgment of nonsuit must be entered. It is expressly stated in the case that the goods in question were delivered by the bankrupts to the defendant with a view to defraud the rest of the creditors; and therefore an action might have been framed to disaffirm the contract, which was thus tinetured with fraud; for, if the assignees had brought an action of trover, they might have recovered the value of the goods. The statute 5 Geo. 2, c. 30, s. 28, enacts, that where it shall appear to the commissioners that there hath been mutual credit between the bankrupt and any other person, or mutual debts between the bankrupt and any other person, before the bankruptey, the commissioners or the assignees shall state the account between them, and one debt may be set against another; and the balance only of such accounts shall be claimed and paid on either side, in the most extensive words; and therefore we are perfectly satisfied with the cases Ex parte Deeze (a), and French v. Fenn; but, if an action of trover had been brought instead of assumpsit, this case would have differed

materially from those two; because in both those cases the goods had got into the hands of the respective parties prior to the bankruptey, and without any view of defrauding the rest of the creditors; and, therefore, according to the justice of those cases, whether trover or assumpsit had been brought, the whole account ought to have been settled in the way in which it was, because the situation of the parties was not altered with a view to the bankruptcy: but here it was; and if trover had been brought, the defendant would have had no defence; and those eases would not have availed him. But this is an action on the contract, for the goods sold by the bankrupt; and although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it, they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold; and as the assignces in this case treated this transaction as a contract of sale, it must be pursued through all its consequences, one of which is, that the party buying may set up the same defence to an action brought by the assignces, which he might have used against the bankrupt himself; and consequently may set off another debt which was owing from the bankrupt to him. This doctrine is fully recognized in Hitchin v. Campbell (a), and in King v. Leith (b). Now here the assignees, by bringing this action on the contract, recognized the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been: and if he had brought the action, the whole account must have been settled, and the defendant would have had a right to set off the amount of the bill. Therefore, on the distinction between the actions of trover and assumpsit, we are all of opinion that a judgment of nonsuit must be entered.

Judgment of nonsuit (c).

This case is one of frequent reference upon the subject of mutual credit; but as the leading case upon that branch of law is unquestionably Rose v. Hart, it seems best to append any remarks on the doctrines of mutual credit and set-off to that decision.

The important principle which Smith v. Hodson is here inserted as establishing, is, that a man who has his option whether he will affirm a particular act

⁽a) 2 Bl. Rep. 827.

⁽b) 2 T. R. 114.

^{378;} Smith v. Gale, ib. 364; and Hulme v. Mugglestone, 3 M. & W.

⁽c) See Atkinson v. Elliott, 7 T. R.

or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit, and reject the rest. "He cannot," to use Lord Kenyon's expression, "blow hot and cold."

This principle, as his lordship in the text observes, is older than the case of *Smith* v. *Hodson*. In *Wilson* v. *Poulter*, 2 Str. 859, an agent had been secretly employed on behalf of a bankrupt after his bankruptcy, to lay out money upon India bonds. The assignee, upon discovering the fact, seized some of the bonds in the agent's hands, and accepted them as part of the estate, and then brought an action against him for the money with which the other bonds were purchased. The court was of opinion that the acceptance of part of the bonds was an affirmance of the agent's act, and that the assignees could not affirm one part, and disaffirm another. In *Billon* v. *Hyde*, 1 Atk. 128, a bankrupt had, in the course of dealing, after the bankruptcy, paid 3000l. to petitioner, and petitioner had in the same dealing paid the bankrupt 712l. Lord Hardwicke decreed that the assignees, having adopted the bankrupt as their factor, must take him as such, for every purpose; and he decreed that the 712l. should be allowed.

The doctrine laid down in the text has been frequently acted on since the decision of *Smith* v. *Hodson*. It will be found laid down by Lord Ellenborough in *Hovil* v. *Pack*, 7 East, 164; and by Lord Tenterden, in *Ferguson* v. *Carrington*, 9 B. & C. 59; and see *Selway* v. *Fogg*, 5 M. & W. 83; *Russell* v. *Bell*, 8 M. & W. 277; and 10 M. & W. 350.

So if a party, with knowledge of fraud in a contract, which would enable him to avoid it, treat it as a subsisting contract, he cannot afterwards repudiate it. See *Campbell* v. *Fleming*, 1 A. & E. 40; and generally if a party having the right to repudiate or affirm a transaction, take the latter course, he cannot afterwards recur to his right of repudiation. See *Richardson* v. *Dunn*, 2 Q. B. 218; *Jordan* v. *Norton*, 4 M. & W. 155.

On the same principle proceeded the decision in Birch v. Wright, 1 T. R. 378, cited ante, vol. i., in the notes to Keech v. Hall, and which establishes that a man cannot at once be treated both as a tenant and a trespasser. That was an action for use and occupation, brought against the defendant, who, on the 18th July, 1777, was tenant of certain lands to Bowes, at 2231. 10s. per annum, payable on the 12th of May and 22nd of November. Bowes had, on the 17th of July, 1777, conveyed the reversion by way of security to the plaintiff and Goostrey, who was since dead, and they had brought an ejectment for the lands against the defendant, and obtained judgment. laying their demise on the 6th April, 1785, and in September, 1785, had obtained possession. All rent had been paid up to the 22nd November, 1784, except the sum of 811. 15s. Under these circumstances, the court held that the plaintiff was entitled to the unpaid rent, up to the day of the demise laid in the ejectment, viz., 6th April, 1785; but not to any rent for the time which had elapsed since. "The plaintiff," said Buller, J., "has not waived the tort. He has brought his ejectment, and obtained judgment on it, which is insisting on the tort, and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other, he says, he is no longer his tenant, and therefore he must deliver up the possession. He cannot do both. The plaintiff's counsel admit that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the defendant is considered as a trespasser; and unless the judgment in ejectment be laid out of the case, the tort is not waived. The defendant stands convicted on record by judgment as a trespasser from the 6th April, 1785."

For the like reason in a recent case where the owner of the soil of a navigable lake over which there was a public highway had taken to a pier wrongfully erected upon his land, it was held that he could not maintain an action against the owner of steamboats for causing persons to pass over the pier for the purpose of navigating the lake. Marsheil v. Ulleswater Steam Nac. Co., L. R. 7 Q. B. 166.

It seems extraordinary that the principal case of Smith v. Heelson, should not have been mentioned in the argument of Buchanan v. Findlay, 9 B. & C. 738. It is true that it is distinguishable from that case; but the distinction was not then established, as it has been since, by Thorpe v. Thorpe, 3 B. & Ad. 583. In Buchanan v. Findlay, the assignees of certain bankrupts sued the defendants for money had and received by the defendants to the use of the bankrupts before, and of the assignees after the bankruptery. The bankrupts, who were merchants at Liverpool, had remitted a bill to the defendants, who were merchants in London, with directions to get it discounted, and apply the proceeds in a particular way. The defendants did not get it discounted, but received the money when it became due, which happened after the bankruptey. Before the bankruptey, the bankrupts had requested to have the bill returned to them. It was held that the defendants could not, in this action by the assignees, set off a debt due to them by the bankrupts.

This case was fully canvassed and explained in Thorps v. Thorps, supra. In that case, the defendant had received from the plaintiff a bill, indersed and payable to the plaintiff, for the purpose of being paid to W.; he had not paid it to W., but had received the money at the maturity of the bill; and the question was, whether, in an action for that money, he could not plead a set-off. The court held that he might. "If," said Parke, J., "the plaintiff had chosen, instead of assumpsit for money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages." [See now, however, the Judicature Act, 1873, 36 & 37 Vict. c. 66, Order XIX., Rule 3.] "But, by bringing assumpsit for money had and received, he lets in the consequences of that action, one of which is the right of set-off. The expressions of the court in Buchanan v. Findlay must be taken with reference to the subject-matter. In that case, the bills remained in the hands of the defendants, unapplied to the purpose for which they had been sent, when the parties who had sent them countermanded the order for their being discounted, and required to have them returned, which was not done. It was not a case of mutual credit, because the transaction, on the part of the defendants, was against good faith. The assignees, in that case, did not affirm any contract by bringing an action for money had and received, which merely stood in the place of an action of trover."

In accordance with this passage is the observation of Patteson, J., in *Groom* v. *West*, 8 A. & E. 772. "If," said his lordship, "a party sends another's bills to be applied to a specific purpose, the receiver cannot, by applying them to his own needs, alter that purpose, and make the trust a debt. This appears from *Buchanan* v. *Findlay*, and other cases." *Russell* v. *Bell*, 10 M. & W. 340.

In the case of Hill v. Smith, 12 M. & W. 618, the same principle was

applied, where a sum of money was paid by K. to a banking company for the purpose of providing for particular bills. K. being then indebted to the company in a larger amount, they placed the sum to the credit of his account with them, instead of following his instructions as to its application. The bills were refused acceptance, and while they remained unpaid in the hands of the holder, K. became bankrupt: it was held that his assignees might recover the whole amount in a special action of assumpsit against the company. "It was well argued," said Baron Parke in delivering the judgment of the court, "by Mr. Cowling, that if a bill of exchange had been delivered to the defendants to be handed over, and they had converted it to their own use, the assignees might have brought an action of trover, and recovered the full value of the bill at the time of the conversion; and that it made no real difference that money, not a bill, was misapplied." See also Alder v. Keighley, 15 M. & W. 117; Colson v. Welch, 1 Esp. 379; and Bell v. Carey, 8 C. B. 887.

Brewer v. Sparrow, 7 B. & C. 310, and Burn v. Morris, 4 Tyrwh. 486, are also two cases ejusdem generis, in one of which the principle laid down in Smith v. Hodson was held applicable, while the other was considered distinguishable. In Brewer v. Sparrow, 7 B. & C. 310, the assignees of a bankrupt brought trover for chattels of the bankrupt, of which the defendant had taken possession. The chattels were part of the bankrupt's stock in trade, which, on the bankrupt's absconding, the defendant had taken possession of, and carried on the trade. He had, however, rendered to the assignees a fair account, and paid over the balance. "The defendant," said Bayley, J., "in the first instance, was a wrongdoer, and the plaintiffs might have treated him as such. But it was competent to them, in their character of assignees, either to treat him as a wrongdoer, and disaffirm his acts, or to affirm his acts, and treat him as their agent; and if they have once affirmed his acts, and treated him as their agent, they cannot afterwards treat him as a wrongdoer, nor can they affirm his acts in part and avoid them as to the rest. By accepting and retaining the balance without objection, they affirmed his acts, and recognised him as their agent, and having so done, they are not at liberty to treat him as a wrongdoer." Judgment for defendant.

The above case was relied on as in point, but held distinguishable, in Burn v. Morris, 4 Tyrwh. 486. That was an action of trover, brought for a 201. bank-note, lost by a clerk of the plaintiff, found by a woman in the street, taken, at her request, by the defendant's son to the bank, and there changed by his father's directions, and the proceeds, minus two sovereigns, given back to the woman. The woman was afterwards taken before the Lord Mayor, and seven sovereigns, part of the proceeds, found on her, and given back to the plaintiff. After a verdict for 131., it was moved, in pursuance of leave, to enter a nonsuit, upon the ground that the receipt of the 71. was an affirmance of the whole transaction. Brewer v. Sparrow, was cited: but Lord Lyndhurst said, "In that case the whole proceeds of the sale were taken; that is an adoption of the act. Here the receipt of the 71. does not ratify the act of the parties, but only goes in diminution of damages."

[It is obvious that in this case, to have construed the receipt by the plaintiff, of that portion of the proceeds of the note which could be followed, as an adoption of the previous wrongful acts, would have been to give to the transaction a meaning which it did not really bear; the receipt, however, of a portion only of the proceeds of the wrongful sale of goods may amount to an adoption of the act of selling, if this appears to have been the intention of the parties; see Lythgoe v. Vernon, 5 H. & N. 180, in which case the Court

of Exchequer held, upon demurrer, that the owner of goods who had, after a tortious sale, claimed the proceeds, and received a portion of them, could not afterwards treat the seller as a wrongdoer, and maintain trover against him. In this case Brewer v. Sparrow was cited, but not Burn v. Morris.]

But where the purchasers of goods from a bankrupt, after notice of an act of bankruptcy, refused to pay for them upon a demand made by the assignees, who also sent to them an invoice of the goods; it was held, the demand made by the assignees not having been complied with, that their acts did not affirm the sale, and that they might recover the value of the goods in an action of trover, Valpy v. Sanders, 5 C. B. 886. See also Morris v. Robinson, 3 B. & C. 196.

[The subject of this note was much considered in the recent case of Smith v. Baker, L. R. 8 C. P. 350, 42 L. J. C. P. 155, where Bovill, C. J., in his judgment, points out that "if an action for money had and received is brought, that is, in point of law, a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law." In that case it was held that the bankrupt's trustee, by getting a fraudulent bill of sale set aside by the Court of Bankruptey and receiving from the defendant the proceeds of the goods comprised in it, which had been sold by the defendant, had precluded himself from suing in trover for the goods. The plaintiff's proceedings were either equivalent to an action for money had and received, or amounted in fact to an affirmance of the wrongful sale.]

As to the right of the assignees of a bankrupt to disaffirm an execution against the bankrupt's goods fraudulently procured by himself; and as to the effect of such disaffirmance, see *Stevenson v. Newnham*, [13 C. B. 285], 22 L. J. C. P. 110.

In Powell v. Rees, 7 A. & E. 426, Rees had before his death tortiously taken coal from land belonging to Powell, Hughes, and Prothero: it was held that, the coal having been sold before Rees' death, money had and received would lie against his administrator for the proceeds of the coal taken more than six months before that event, and trespass for the coal taken afterwards, under stat. 3 & 4 W. 4, c. 42, s. 2. This was, however, on the ground that the subject-matter of each action was distinct. The "intestate," said Lord Denman, "was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries."

[So where in ejectment for alternative breaches, viz., permitting a sale by auction upon the demised premises and non-payment of rent accruing due subsequently, the defendant paid the rent due into court, and the plaintiff took it out in satisfaction, it was held that the acceptance of the rent under such circumstances did not amount to a waiver by the plaintiff of his right to bring ejectment in respect of the alternative breach, *Toleman v. Porthory*, L. R. 7 Q. B. 344, 41 L. J. Q. B. 98, and see the notes to *Dumpor's Case*, ante, vol. i., as to waiver of forfeiture.]

Where the defendants had wrongfully taken possession of the money of the plaintiff, and paid the amount into a bank in their joint names, it was held that the plaintiff might waive the trespass and recover the amount as money had and received, *Neate v. Harding*, 6 Exch. 349. As to the right to waive the trespass where there has been a wrongful entry on land, and to sue for use and occupation, see *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932 [and the notes to *Keech* v. *Hall*, ante, vol. i.

Where the tort is not waived, but an action is brought by the bankrupt's trustee for the conversion of the goods, as it was suggested in the principal case might have been done, there must be an avoidance of the contract by the trustee, and therefore a demand and refusal are necessary before action brought. But this is not so where the tort is waived and an action brought for the proceeds of the conversion, Heilbut v. Nevill, L. R. 5 C. P. 478, 39 L. J. C. P. 245. That the bankrupt's trustee has the right to bring such an action, see Marks v. Feldman, L. R. 4 Q. B. 481, 38 L. J. Q. B. 220.]

If a party has the option to affirm or disaffirm a particular act or contract, he must either affirm or disaffirm it altogether. Many of the cases result from insolvency or the transactions of principal and agent. It has been held that if an agent, to pay his own debt, sells his principal's property, the latter cannot maintain assumpsit against the purchaser, but should have brought trover; Whitlock v. Heard, 3 Rich. 88. In Bennett v. Judson, 21 N. Y. 238, it was held that the principal, having accepted the proceeds of the sale of land, was liable in damages for material misrepresentations of the agent; see Stone v. Denny, 4 Met. 151; Stockwell v. U. S., 13 Wall. 531, 567. And in accordance with the opening proposition, a principal in enforcing a sale made by his agent, cannot allege that the agent exceeded his instructions in warranting the property; see Chandelor v. Lopus, note.

An important feature of the subject is the effect of the bringing of a suit in precluding the bringing of another inconsistent with it. The master of a vessel exceeded his authority by disposing of the cargo to pay a debt already due from the owner to the vendee. The assignee of the bill of lading brought an action of assumpsit against the vendee and then discontinued it and resorted to one of trover. The court held that discontinuing before trial did not amount to ratification; Peters v. Ballistier, 3 Pick. 495, 505. See Butler v. Hildredth, 5 Met. 49, in which it was held that bringing an action for the price and securing the demand by an attachment, was an affirmation of the sale and the waiver of the right to disaffirm it. In Nield v. Burton, 49 Mich. 53, it was held that bringing assumpsit precluded the plaintiff from afterwards maintaining trover, although the court had no jurisdiction of the first action; see

Beurmann v. Van Buren, 44 Mich. 496; Thompson v. Howard, 31 Id. 309. "The principal upon being informed of an act of an agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act, or not, and so long as the condition of the parties is unchanged, he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid, and his election once made is irrevocable;" Andrews v. The .Etna Ins. Co., 92 N. Y. 596, 604; 85 Id. 334.

"The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon a disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." Accordingly a bill in equity for specific performance and an action at law in damages for breach, are both in affirmance of the contract and are not inconsistent remedies, and the plaintiff may be compelled to elect; Connihan v. Thompson, 111 Mass. 270; see Gardner v. Lane, 98 Mass. 517; Hooker v. Hubbard, 97 Id. 175; Morris v. Rexford, 18 N. Y. 552; Rodermund v. Clark, 46 Id. 354; Warren v. Spencer Water Co., 143 Mass. 9, 15; Eliot v. McCormick, 144 Id. 10; Bunch v. Grave, 111 Ind. 351, 357; Lee v. Templeton, 73 Ind. 315; Browning v. Bancroft, 8 Met. 278. If a party sues on a promissory note and obtains a verdict, he cannot in another suit between the same parties, in which he is defendant, maintain that although in form a promissory note the transaction was in effect a payment; Lilley v. Adams, 108 Mass, 50; see Sears v. Carrier, 4 Allen 339. Cases in which it was held that a party was bound by his election are Washburn v. Great Western Ins. Co., 114 Mass. 175; Steinbach v. Relief Ins. Co., 77 N. Y. 498, 502; Fields v. Bland, 81 N. Y. 239; Stoddard v. Cutcompt, 41 Ia. 329; Thompson v. Howard, 31 Id. 309; Sloan v. Holcomb, 29 Id. 153. It has been held that one who has received a legacy under a will cannot contest the validity of the will without restoring the legacy, or bringing the money into court; Lee v. Templeton, supra; Holt v. Rice, 54 N. H. 398; 20 Am. Rep. 138; see State v. Adams, 71 Mo. 620.

"An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed;" Watson v. Watson, 128 Mass. 152, 155; Anderson's Appeal, 36 Penn. St. 476; Wells v. Robinson, 13 Cal. 133; see Patterson v. Gandasequi, note. A joint and several bond or promissory note must be treated as one or the other, and after a joint judgment thereon one of the obligors or promisors cannot be sued separately; United States v. Price, 9 How. 83; Beltzhoover v. Commonwealth, 1 Watts 126; Pickersgill v. Lahens, 15 Wall. 140, 144; contra, United States v. Cushman, 2 Sum. 436. If the landlord has the option to treat his tenant either as a trespasser or as being rightly in possession he must choose; Me-Kildoe v. Darracott, 13 Gratt. 278; Stuyvesant v. Davis, 9 Paige 427. A judgment against either principal or agent after the former is disclosed estops from suing the other; Garrard v. Moody, 48 Ga. 96; Tuthill v. Wilson, 90 N. Y. 423. It has been held that the mere suing both without judgment is not an election to hold the principal and discharge the agent; Mattlage v. Poole, 15 Hun 556; Fontaine v. Eagle Man. Co., 52 Ga. 31. Privies as well as immediate parties are bound by the estoppel of an election; Fire Ins. Co. v. Cochran, 27 Ala. 228; Merrick's Estate, 5 W. & S. 9; Rawson v. Turner, 4 Johns. 469; Patterson v. Gandasequi, note.

Often the ground taken by a party to a suit deprives the other of a good defence, or prevents recovery on a valid cause of action. Such party cannot, to the injury of his opponent, shift his ground in a subsequent suit. It was held where defendants procured the dismissal of a cause in one court upon the ground that it was properly pending in the court of another county to which it had been transferred, that they were estopped to deny the jurisdiction of the court of the other county; Perkins v. Jones, 62 Iowa 345. A defendant defeated an action on the ground that a third person should have been joined with the plaintiff as a partner; it was held that he could not deny the partnership in a subsequent suit for the

same debt by both; Kelly v. Eichman, 5 Wharton 446; 3 Id. 419; see Garrett v. Lyle, 27 Ala. 586; Variek v. Edwards, 11 Paige 289; Hayes v. Gudykunst, 11 Penn. St. 221; Taylor v. Parkhurst, 1 Id. 197; Martin v. Ives, 17 S. & R. 364; Queen v. Sandwich, 10 Q. B. 563, 571; Powell v. Washington, 15 Ala. 803; The Bark Edwin, 1 Sprague 477; Weedon v. Landreaux, 26 La. Ann. 729; Smith v. McNeal, 68 Penn. St. 164; Bank v. Dennis, 37 III. 381; Vanleer's Appeal, 24 Penn. St. 224; Dewey v. Bell, 5 Allen 165; Foster v. Bettsworth, 37 Iowa 415; Koon r. Snodgrass, 18 W. Va. 320; McLeod r. Johnson, 28 Miss. 374; Potter v. Adams, 24 Mo. 159; Railroad Co. v. Bank, 102 U. S. 14; Garber r. Doersom, 117 Penn. St. 162. Further cases which hold that one cannot affirm those parts of a transaction in his favor and disaffirm the rest to the injury of others are Adlum v. Yard, 1 Rawle 163; Garnham v. Rogers, 1 Dickens 63; Pickett v. Bank, 32 Ark. 346; Moller v. Tuska, 87 N. Y. 166; Loney v. Bailey, 45 Md. 447.

For cases which hold that fraudulent or illegal acts may be void as to those injured thereby, yet binding on the doer and volunteers under him, see Seal v. Duffy, 4 Barr 274; Carr v. Acroman, 11 Ex. 566; Wilcocks v. Waln, 10 S. & R. 380; Manufacturers' Bank v. Bank of Pennsylvania, 7 W. & S. 335; Vandyke v. Christ, 7 Id. 373; Kenneman v. Miller, 2 Md. 407; Loney v. Loney, 2 Carter 196; Thompson v. Dougherty, 12 S. & R. 448; Cushwa v. Cushwa, 5 Md. 44.

The rule under consideration is often applied in the case of wills. Where a testator gives the property of A. to B., and then gives A. a legacy, the rule is well established at law, as well as in equity, that if A. elects to take the legacy, he shall not set up any right or claim of his own "which shall defeat or in any way prevent the full effect and operation of every part of the will;" Hyde v. Baldwin, 17 Pick. 303, 308; Collins v. Woods, 63 Ill. 285; Noe v. Splivalo, 54 Cal. 207; Wise v. Rhodes, 84 Penn. St. 402; Smith v. Smith, 14 Gray 532; Watson v. Watson, 128 Mass. 152; Brown v. Brown, 108 Mass. 386. The principle is extended to a widow's dower at common law; Savage v. Burnham, 17 N. Y. 561, 571; Lord v. Lord, 23 Conn. 327; Higginbotham v. Coonell, 8 Gratt. 83; Fulton v. Fulton, 30 Miss. 586; see Sanford v. Sanford, 58 N. Y. 69; s. c. 45 Id. 723; Asch v. Asch, 47 Hun 285; Konvalinka v. Schlegel, 104 N. Y. 125; Yorkly v. Stinson, 97 N. C. 236; Stockton v. Wooley,

20 Ohio St. 184; Thompson v. Hoop, 6 Id. 480; Carder v. Fayette Co., 16 Id. 353; Stilley v. Folger, 14 Ohio 610; see Re Vowers, 45 Hun 418. If the gift is subject to conditions and the donee elects to take, he must take with the burdens attached; Scholey v. Reed, 23 Wall. 331. In the case of a devise it was held that, as the widow and children occupied the lands without exercising rights adversely to each other, inferences could not be drawn which should operate as an estoppel against parties subsequently setting up legal rights to the lands thus occupied; Fitts v. Cook, 5 Cush. 596, 601. For a case where, "by accepting the position of executor, by giving bond, and by continuing to occupy the real estate left by the deceased," one was held to have "adopted, ratified, and confirmed the will," and was thus "estopped from setting up any claim or right which would defeat it," see Smith v. Wells, 134 Mass. 11, 13,

This subject is more fully treated under estoppel in the note to Patterson v. Gandasequi, and the subject of mutual credits will be found in the note to Rose v. Hart.

DOVASTON v. PAYNE.

35 G. 2, C. P.

[REPORTED 2 HEN. BL. 527.]

The property of a highway is in the owner of the soil, subject to an easement for the benefit of the public. Therefore, a plea in bar of an avowry for taking cattle damage feasant, that the cattle escaped from a public highway into the locus in quo, through the defect of tences, must show that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped.

REPLEVIN for taking the cattle of the plaintiff. Avowry that the defendant was seised in fee of the locus in quo, and took the cattle damage feasant. Plea, that the locus in quo "lay contiguous and next adjoining to a certain common and public king's highway, and that the defendant, and all other owners, tenants, and occupiers of the said place in which, &c., with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the hedges and fences between the said place in which, &c., and the said highway, when and so often as need or occasion hath been or required, or shall or may be or require, to prevent cattle being in the said highway from erring and escaping thereout into the said place in which, &c., through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c., and the said highway, before and at the time when, &c., were

ruinous, broken down, prostrated, and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned, just before the said time when, &c., being in the said highway, erred and escaped thereout, into the said place in which, &c., through the defects and defaults, &c., &c. To this plea there was a special demurrer, For that it is not shown in or by the said plea, that the said cattle, before the said time when, &c., when they escaped out of the said highway into the said place in which, &c., were passing through and along the said highway, nor that they had any right to be there at all, &c.

In support of the demurrer, Williams, Serjt., argued as follows: It is a rule in pleading, that if the defendant admits the fact complained of, he must show some good reason or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the plaintiff's fences, the defendant must have shown that he had an interest in that close, or a licence from the owner to put his cattle there, Dyer 365 a, Sir F. Leke's Case, recognised Hob. 104, Digby v. Fitzherbert; for a man is bound to repair against those who have right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must show they were lawfully using the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the being there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do anything but merely pass and repass, Bro. Abr. Tresp. pl. 321, and according to this principle, the entries state, in pleas of this kind, that the cattle were super viam prædictam transeuntes, Thomp. Entr. 296, 297; and in Herne's Plead. 822, that they were "driven along the highway."

Heywood, Serjt., contra. — The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the plaintiff pleads the plea, and it is sufficient for him to show that his cattle were wrongfully taken. The passing on the highway is as uncertain as the being there, and as little traversable. But the material issues on the record would be, whether the fences were out of repair, and whether the defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar, certainty to a common intent is sufficient. It

may therefore be intended that the cattle were lawfully in the highway.

Lord C. J. Eyre. - I agree with my brother Williams as to the general law that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must show that he was lawfully using the easement when the cuttle so escaped. This therefore reduces the case to a single point, namely, Whether it does not appear on the plea, to a common intent, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "being in the said highway"? This is a different case from cattle escaping from a close, where it is necessary to show that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt, therefore, whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing; and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially, proved. But I doubt whether the being in the highway might not have been traversed; and if the being in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not meet a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole I rather think the objection a good one, because those forms of pleading are as cited by my brother Williams.

Buller, J. — This is so plain a case that it is difficult to make it a ground of argument. But my brother Heywood says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ is, that if trespass be brought for taking cattle which were distrained damage feasant, it is sufficient for the defendant to say that he was possessed of the close, and the cattle were doing damage; but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass and against replevin: for in trespass an excuse in a plea is sufficient, but in

an avowry a title must be shown. (a) This brings me to the question, Whether the plea on this record be good to a common intent? Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke (b) to be of three sorts, viz., certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Ashton treat these distinctions as a jargon of words, without meaning. They have, however, long been made, and ought not altogether to be departed from. Concerning the last two kinds of certainty, it is not necessary to say anything at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (c). By a common intent I understand that when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail: it is simply a rule of construction, and not of addition: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable: for the question, Whether the plaintiff was a trespasser or not? depends on the fact, whether he was passing and repassing, and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point, therefore, is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal.

Heath. J. — The law is, as my brother Williams stated, that if eattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an

⁽a) See the note to Mellor v. Spateman, 1 Wms. Saund. 346 e, and to Paule v. Longueville, 2 Wms. Saund. 284 n.

⁽b) Co. Litt. 303.

⁽c) Co. Litt. ibid.

easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal (a).

Rooke, J., of the same opinion.

Judgment for the defendant.

It is intended to append to this case a few remarks upon the branch of law, with reference to which it is usually cited; namely, the respective rights of the public, and of the owners of the soil, over a common highway. The questions on which it is intended to touch are—

- I. What is a highway.
- II. How it originates.
- III. How it may be lost.
- IV. How it is to be kept in repair.

I. Highway. — What. — A highway is a passage which is open to all the king's subjects. Mr. Wellbeloved defines it to be a thoroughfare; but there are still doubts whether a highway must necessafily have been originally a thoroughfare; and it seems, at all events, that if a highway were stopped at one end, so as to cease to be a thoroughfare, it would in its altered state continue a highway; per Patteson, J., Rex v: Marquis of Downshire, 4 A. & E. 713. However, I have adopted the above definition as the safest; since, whether or no a passage, to be open to all the king's subjects, need be a thoroughfare, it is clear that every passage which is open de jure to all the king's subjects, must be a highway. (There seems, however, to be no longer any doubt that there may be a public highway over a place where no thoroughfare exists. Bateman v. Bluck [18 Q B. 870]. And see The Trustees of the Rughy Charity v. Merryweather, 11 East. 375 n. [Souch v. East London Railway Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477.])

It may be a footway, appropriated to the sole use of pedestrians; a pack and prime way, which is both a horse and foot way; or a cart way, which comprehends the other two, and also a cart or carriage way. Co. Lit. 56 a. But to whichever of these classes it belong, it is still a highway: for "highway is the genus of all public ways, as well cart, horse, and foot ways." Per Lord Holt, Regina v. Saintiff, 6 Mod. 255. See Logan v. Burton, 5 B. & C. 513; Allen v. Ormond, 8 East, 4; R. v. Inhabs. of Salop, 13 East, 95; Domina Regina v. Cluworth, Salk. 358. See, as to railroads, R. v. Severn and Wye Railway Co., 2 B. & A. 646.

Nay, even public rivers are, in law, to be considered highways, since they fall within the definition above given, and are passages open to all the king's subjects, 1 Lord Raym. 725; 2 Lord Raym. 1174; R. v. Hammond, 10 Mod. 382; Com. Dig. Chimin. A. 1; Mayor of Lynn v. Turner, Cowp. 86; R. v. Lord Grosrenor, 2 Stark. 511; Mayor of Colchester v. Brooke, 7 Q. B. 339; Dimes v. Petley, 15 Q. B. 276. [There may be a highway along the top of a river embankment, Greenwich Board of Works v. Mawdslay, L. R. 5 Q. B. 397, 39 L. J. Q. B. 205.]

⁽a) [See per Cairns, L. C., Bangley v. Midland Rail. Co., 37 L. J. Ch. 313, 316.]

The interest of the public in a highway consisting solely in the right of passage, the soil and freehold over which that right of way is exercised may be, and generally is, vested in a private owner, who may maintain an action against persons who infringe his rights therein, as, for instance, by permitting cattle to depasture there. See the principal case, and Sir John Lade v. Shepherd, 2 Str. 1005; Stevens v. Whistler, 11 East, 51.

The rule that the interest of the public in a highway consists solely in the right of passage is well illustrated by a case in the Court of Queen's Bench, in which this principle was applied in its full extent. In this case, R. v. Pratt, 4 E. & B. 860, Pratt had been convicted by justices under the 1 & 2 Wm. 4, c. 32, s. 30, of committing a trespass, by being in the day-time on land in the occupation of B. in search of game. On appeal a case was reserved by the sessions for the opinion of the court, and the facts appeared to be that Pratt was in the day-time on a public road (the soil of which as well as the land on both sides, belonged to B.) carrying a gun and accompanied by a dog; that Pratt sent the dog into a cover by the road-side which was in the actual occupation of B., and that a pheasant flew across the road from the cover and was fired at by Pratt, who was still standing upon the road. Upon these facts, the court held that the conviction was right, the road being land in the occupation of B., subject only to the right of way of the public, and the evidence showed that Pratt was not on the road in the exercise of the right of way, but for another purpose, namely, the search for game, and that thus he was a trespasser. "On these facts," said Lord Campbell, C. J., "I think that the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of B. in search of game. He was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land, that is B. It is true the public had a right of way there; but subject to that right, the soil, and every right incident to the ownership of the soil, was in B. The road, therefore, must be considered as B's land. Then Pratt, being on that land, was undoubtedly a trespasser if be went there, not in exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he committed the offence named in the act; he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to the dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates are fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game."

And as the interest of the public is thus limited to the right of passage the owner of the soil may continue to use it for his own purposes in any manner not inconsistent with this right. St. Mary Newington v. Jacobs, L. R. 7 Q. B. 47, 41 L. J. M. C. 72.

As to the right of a Railway Company to tunnel under a highway, see Souch v. East London Railway Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477. It is not easy to see why the owner of the soil beneath a public highway should be bound to allow a Railway Company to tunnel through it without paying him compensation, though in the above case, Malins, V. C., states it to be his opinion that the Railway Company clearly has a right to do so. In a subsequent proceeding in the same case, reported 22 W. R. 566, Bacon, V. C., said that he could not read the acts of Parliament as giving powers beyond that which was necessary for the maintenance of the street or passage: all beyond that belonged to the owners of the property, and he directed an account to

be taken of the compensation to be paid by the company. Compare Gondson v. Richardson, L. R. 9 Ch. 221, where the Lords Justices granted an injunction to restrain the continuance of water-pipes, which had, without the consent of the owner of the soil, been laid in the soil of a highway.]

The general primâ facie presumption of law is, that the freehold of the road, usque ad medium filum viæ, is in the proprietors of the land on either side, Cooke v. Green, 11 Price, 736; Hedlam v. Headley, Holt, 463; see, however, the exception stated by Lord Denman, C. J., R. v. Hatfield, 4 A. & E. 164, and per Lord Tenterden, C. J., in R. v. Edmonton, 1 M. & Rob. 24.

This presumption applies as well to private as to public roads. "This presumption," said Cockburn, C. J., in the modern case of Holmes v. Bellinghem, 7 C. B. N. S. 329, "is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition, — which may be more or less founded in fact, but which at all events has been adopted, — that when the road was originally formed, the proprietors on either side each contributed a portion of his land for that purpose. I think that is an equally convenient and reasonable principle, whether applied to a public or to a private road, but in the latter case it must of course be taken with this qualification, that the user of it has been quâ road, and not in the exercise of a claim of ownership."

[It may, however, be rebutted, see Brekett v. Corporation of Leeds, L. R. 7 Ch. 421, where James, L. J., says: "I should myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, and a site is granted by the roadside for the erection of a cottage or house, and a cottage or house is built upon that site, the mere conveyance, or grant, or demise of a piece of land as a site of and for the purpose of building a house is, in presumption of law, a grant to the middle of the high-road, the frontage of which is probably the origin of the house being built on that space." See also the Marquess of Satishary v. The Great Northern Rail. Co., 5 C. B. N. S. 174, as to what provisions in local turnpike acts are sufficient to rebut this presumption. The presumption of a grant usque ad medium filum via, does not exist where the parcel conveyed is described as bounded by an intended highway which has never in fact been dedicated, Leigh v. Jack. 5 Ex. D. 264. And see Landrock v. Metropolitan District Rail. Co., W. N. 1886, 195.]

So likewise the waste land on each side of the road [is presumed to belong to the adjoining owners], Steele v. Prickett, 2 Stark, 463; Doe v. Pearsey, 7 B. & C. 304, [Tutel v. Local Board of Health for West Ham, L. R. 8 C. P. 447]; unless, indeed, it communicate with other larger wastes belonging to the lord of the manor, Anon. Loft. 358; Grose v. West, 7 Taunt. 39; Doe d. Barrett v. Kemp, 7 Bing. 332 [and see Gery v. Redman, 1 Q. B. D. 161.

The effect of the Public Health Act, 1875, ss. 4 and 149, is to vest the soil of a highway which constitutes a "street" within the Act in the local board, who may therefore make a valid lease of the pasturage of the strips of grass forming the sides of the highway, Coverdale v. Charlton, 4 Q. B. D. 104, C. A. This interest in the soil, however, ceases on the extinction of the highway, Rolls v. St. George the Martyr, Southwark, 14 Ch. D. 785, C. A., and does not extend to a proprietary right in the air usque ad cælum, so as to entitle the local authority to an injunction restraining the suspension of a telephone wire across the "street," no nuisance or appreciable danger to the user of the street being shown to be caused thereby, Wandsworth Board of Works v.

United Telephone Co., C. A., 13 Q. B. D. 904; 53 L. J. Q. B. 449; a case decided under s. 96 of the Metropolis Management Act, 1855.]

Nay, not only may the soil over which the highway passes be vested in an individual, but it may be subject to a private right of way co-existent with the public one, *Brownlow v. Tomlinson*, 1 M. & Gr. 484. Or to a custom of partial interruption for a limited time by the erection of booths during a fair, *Elwood v. Bullock*, 6 Q. B. 383. The right of the public, however, is that which is of chief importance, and is principally to be taken care of.

And therefore if a highway become so out of repair and founderous, as to be impassable, or even incommodious, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated, 1 Roll's Abr. 390 A. pl. 1, B. pl. 1; 1 Hawk. P. C. 76, s. 2; Absor v. French, 2 Show. 29, pl. 19; Taylor v. Whitehead, Dougl. 749, [2 Wms. Saund. 161 n. (12)]; a privilege which the grantee of a private way can under no circumstances assume. Pomfret v. Ricroft, 1 Wms. Saund. 322 a, n. 3; Taylor v. Whitehead, ubi supra; Bullard v, Harrison, 4 M. & S. 387.

[Even as to the case of a public way doubts are expressed in *Arnold* v. *Holbrook*, L. R. 8 Q. B. 96, 42 L. J. Q. B. 83, where it was held that the defendant had no right to deviate from a public footpath which had been ploughed up, the dedication being limited by the right of the owner so to plough it up. See also the remarks on this subject in Spearman on Highways, p. 47.

There is, however, an obvious distinction between allowing a private way to become founderous and actually obstructing it, and it has been held by the Lords Justices, that if A. grants a right of way to B. over his field, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land without trespass, per Lord Selborne, C., Selby v. Nettlefold, L. R. 9 Ch. 111, 43 L. J. Ch. 357.

Whether this right of going on the adjacent land exists in cases in which the highway is obstructed by a wrong-doer was considered in Dawes v. Hawkins, 8 C. B. N. S. 848. Mr. Justice Williams observed that it is remarkable that in the text-books this right is confined to cases in which the highway is founderous and out of repair; and that on principle it may be doubted whether the burthen to which the adjacent soil is subjected when the parish has been guilty of a non-feasance in neglecting to keep the highway in repair, ought to be likewise inflicted because some wrong-doer has put an obstruction on the highway, which may be abated as a nuisance by any one who has occasion to use the road; at all events, unless the obstruction be of such a nature that practically it cannot be abated, and so the road is in effect impassable. The Lord Chief Justice Earle said, however, that he knew of no decision and no principle making a distinction between a road impassable by non-feasance, that is, neglect of repair, and a road impassable by misfeasance, that is, by ditch and bank wilfully made; and Mr. Justice Williams added, that in Absor v. French, supra, which is very shortly and obscurely reported in 2 Show. 29, it seems to have been held a good plea to an action of trespass that the plaintiff himself had stopped a highway so as the defendant could not pass, and therefore he went over the plaintiff's close, doing as little harm as he could. See as to this, Selby v. Nettleford, ubi supra.]

II. As to the mode in which a highway is created.—Except where this is done by the express enactment of the Legislature, it derives its existence from a dedication to the public by the owner of the land over which the

highway extends, of a right of passage over it; and this dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed, R, v. Lloyd, 1 Camp. 260. See British Museum v. Finnis, 5 C. & P. 460; and the Grand Surrey Canal Co. v. Hall, 1 M. & Gr. 393. An open user as of right by the public raises a presumptive inference of dedication requiring to be rebutted; and when such user is proved, the onus lies on the person who seeks to deny the inference resulting from it to show negatively that the state of the title was such that no one could make a valid dedication, R, v. Petric, 4 E. & B. 737.]

"No particular time is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway." Per Chambre, J., in Woodyer v. Hudden, 5 Taunt, 125.

Eight, and even six years, have been held time enough wherein to presume a dedication from user, Trustees of Rugby Charity v. Merryweather, 11 East, 376. Four years have been held too short a time. But all depends upon the special circumstances of each case, as will be understood from the remarks of Chambre, J., above cited, R. v. Hudson, 2 Str. 909; R. v. Wright, 3 B. & Ad. 681; and the duration of the public user, which limits the rights of the owner of the soil, is not so important in this respect as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him, as well as the intention indicated by those acts. See Rey. v. Charley, 12 Q. B. 515; North London Railway Co. v. St. Mary Islington, 21 W. R. 226, 27 L. T. N. S. 672.

In the case of *Dawes* v. *Hawkins*, 8 C. B. N. S. 848, already cited, a length-ened user by the public of a line of road substituted for an ancient highway which continued for the same period wrongfully obstructed, was considered by the court to be referable to the right of the public to deviate on the adjoining land when the owner of the soil illegally stops up the highway, or suffers it to become founderous, and therefore not to afford evidence of the dedication to the public of the substituted way. From this view, however, Mr. Justice Williams dissented, being of opinion that, as the owner of the soil over which the public had passed had for many years submitted to this burthen, instead of causing the obstruction on the ancient highway to be removed, this afforded *some* evidence of an intention to dedicate the substituted highway to the public.]

A dedication cannot be presumed against the crown, *Harper v. Charlesworth*, 4 B. & C. 574. This, however, must be taken with some qualification. See *Reg. v. East Mark*, 11 Q. B. 877.

As a dedication to the public will be presumed where circumstances warrant it, so that presumption may be rebutted, and prevented from arising, by circumstances incompatible with the supposition that any dedication has taken place. Thus, though we have seen that if a man open a useful passage from one public highway or street into another, a presumption will, in course of time, arise, that he has dedicated that passage to the public; yet if he place a bar or gate across the road, which may be opened and shut at pleasure, the presumption of dedication is rebutted. Nay, though the bar or gate have been knocked down, the fact of its having once been there will, at least for a considerable time, prevent the presumption of a dedication from arising, Roberts v. Karr, 1 Camp. 262, note; Lethbridge v. Winter, 1 Camp. 263. See

British Museum v. Finnis, 5 C. & P. 460. So too it may be proved that the user took place under an agreement, Barraclough v. Johnson, 8 A. & E. 104. See Grand Surrey Canal Co. v. Hall, 1 M. & Gr. 393; and Ferrand v. Milligan, 7 Q. B. 730. [Healey v. Battey, L. R. 19 Eq. 375; in a case in which it appeared that a road had been originally made by turnpike trustees under a temporary and expired act, and formed a portion only of the line of road which they had been authorised to make, but that it had been repaired by the parish, both before and after the expiration of the temporary act, the court held that there was evidence of a dedication and of an adoption by the public, and that the circumstances under which the road was made might explain away such evidence, but did not, as a matter of law, conclusively rebut it, R. v. Thomas, 7 E. & B. 399.]

A dedication to the public may be limited in point of time by acts contemporaneous with the dedication, R. v. Hudson, 2 Str. 909; R. v. Northampton, 2 M. & S. 262. See R. v. Mellor, 1 B. & Ad. 32. [That is to say, a highway may be useable by the public at certain times only; as in R. v. Northampton, where a public bridge was used by the public at all times when it was dangerous to pass through the river. But a dedication once made cannot, it is said, be limited in duration. "If a way is dedicated at all, it must be dedicated in perpetuity." See the judgment of Byles, J., in Dawes v. Hawkins.]

But whether a dedication can be partial in its extent, is a question of some doubt and difficulty. See it discussed by Mr. Wellbeloved, on Highways, p. 52, et seq. See also Marquis of Stafford v. Coyney, 7 B. & C. 257; Rex v. Leake, 2 N. & M. 595; 5 B. & Ad. 469; Lethbridge v. Winter, 1 Camp. 263.

[A highway may, however, be dedicated to the public, subject to a pre-existing right of user by the owners of the adjoining lands for the purpose of depositing goods on it; so, it may be dedicated with an obstruction on it, or excavation in it, or near it, which is a hindrance, and dangerous to passengers, and which if placed or made on or near the highway after its dedication would have been a nuisance: and no action will lie against the person dedicating in respect of any injury caused thereby. See Le Neve v. Mile End Old Town, 8 E. & B. 1054; the judgment in Morant v. Chamberlin, 6 H. & N. 541; the judgment in Fisher v. Prowse, 2 B. & S. 770; and Robbins v. Jones, 15 C. B. N. S. 221.

So there may be a dedication of a footway to the public, subject to the reservation by the owner of the right to plough it up periodically, which limit to the dedication may be proved by user, *Mercer* v. *Woodgate*, L. R. 5 Q. B. 26, 39 L. J. M. C. 21, followed in Cam. Scacc., *Arnold* v. *Blaker*, L. R. 6 Q. B. 433, 40 L. J. Q. B. 185.

The law on this subject is laid down by Blackburn, J., in the masterly judgment of the Court of Queen's Bench in Fisher v. Prowse, in the following terms, adopted by the Common Pleas in Robbins v. Jones. "The law is clear that if, after a highway exists, anything be newly made so near to it as to be dangerous to those using the highway — such, for instance, as an excavation (Barnes v. Ward, 9 C. B. 392), this will be unlawful and a nuisance: as it also is if an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous (Req. v. Watts, 1 Salk. 357); and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself; but the question still remains whether an erection or excavation already existing and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedi-

cated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred.

"On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired: it would be doubly so if the consequence were that he was bound to fill up or fence off his canal."]

It was decided in the case of *Poole* v. *Huskinson*, 11 M. & W. 827, that there cannot be a dedication to a limited portion of the public. Such a dedication is merely void, and does not operate as a dedication to the whole public. It seems clear, however, from the case of *Poynton* v. *Wilson*, 2 Lutw. 1507 (not cited in *Poole* v. *Huskinson*), and Co. Litt. 4 a, that such a right may be created by custom. [And it would seem that an owner cannot without legislative authority dedicate, reserving to himself a right to take toll for the user, *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750.]

It must also be observed that the dedication of the owner of a particular estate will not bind those in remainder, or prevent them from stopping the way dedicated, when the estate comes into their possession, Wood v. Veal, 5 B. & A. 454. See Baxter v. Taylor, 1 N. & M. 13; R. v. Edmonton, 1 M. & Rob. 24. Unless, indeed, in the course of the period during which the way has been used, there have been a succession of tenants, or the landlord has had express notice of the user, in which cases his assent to it might be implied, R. v. Barr, 4 Camp. 16. A body corporate may dedicate, Grand Surrey Canal Co. v. Hall, 1 M. & Gr. 393.

The assent of the parish through which the highway runs is not [at common law] requisite to give effect to the dedication thereof [as regards repairs], R. v. Leake, 5 B. & Ad. 469; though the contrary of this proposition was once contended for, R. v. St. Benedict, 4 B. & A. 447; R. v. Mellor, 1 B. & Ad. 32; R. v. Cumberworth, 3 B. & Ad. 108; R. v. Wright, 3 B. & Ad. 683. See now, however, on this subject, 5 & 6 W. 4, c. 50, s. 23, [as to roads dedicated since the passing of that act] cited post.

[It should further be observed that apart from the question of liability to repair, it is necessary for the public to assent (of which user would be evidence), in order that a way may become public. See the judgment of

Blackburn, J., in Fisher v. Prowse, ubi sup., and of Brett, J., in Cubitt v. Macse, L. R. 8 C. P. 704.]

It has been already remarked, that a highway is sometimes created by an act of parliament passed for that purpose. The provisions of such an act must be strictly followed, or the creation will not take place. See R. v. Haslingfield, 2 M. & S. 558. Where an act of parliament directed a road from A. to B., it was held that the whole line must be complete, before any portion of it would become a highway repairable by the parish, R. v. Cumberworth, 3 B. & Ad. 108, and 4 A. & E. 731; R. v. Edge Lane, 4 A. & E. 723. [But this proposition was held by the Court of Appeal to be no longer law, Reg. v. French, 4 Q. B. D. 507, 48 L. J. M. C. 175.] Where a road has been made by trustees under a local and temporary act, and there had been an user of it for a considerable time by the public, it was held that the parish was liable to repair it so long as the statute authorising its construction was kept in force by temporary continuation acts, and that the road was properly described in the indictment as a common Queen's highway. See Reg. v. Lordsmere, 15 Q. B. 689, and R. v. Mellor, supra. [Where an inclosure award and map made in 1808 set out a strip of land as a highway, and it was accordingly set out properly by metes and bounds on the land and fenced, but was never completely formed, and was never used by the public, it was held that it never became a highway, Cubitt v. Maxse, L. R. 8 C. P. 704, 42 L. J. C. P. 278.]

III. As to the mode in which a highway may be lost. — The common law presents no means by which a public right of way can be lost absolutely, Fowler v. Sanders, Cro. Jac. 446. It might, however, be diverted from one line of road into another; and that either by the act of God — as if a navigable river change its course, see Reg. v. Bamber, 5 Q. B. 279; Reg. v. Paul, 2 M. & Rob. 307, coram Maule, J.; or by proceedings on a writ entitled that of ad quod damnum, which is an original writ issuing out of Chancery, and directing the sheriff to summon a jury to inquire whether the proposed diversion will be detrimental to the public, and to return the inquisition into Chancery, where any person injured thereby might have impeached it. "It is an established maxim, - once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription. only methods of legally stopping a highway, are either by the old writ of ad quod damnum, or by proceedings before magistrates under the statute." See the judgment of Byles, J., in Dawes v. Hawkins, 8 C. B. N. S. 858; [and see Turner v. Ringwood Highway Board, L. R. 9 Eq. 418. In the last case, Sir William (then V. C.) James refused to grant an injunction on behalf of the alleged owner of the soil of a road against the Highway Board felling trees which had grown up so as to be an obstruction, but on the side of the road where there was no via trita, and see Wilkins v. Day, 12 Q. B. D. 110. Where the ways giving access to a footway have by order of quarter sessions been stopped up at both ends of it, the footway is lost, Bailey v. Jamieson, 1 C. P. D. 329.7

A public highway may, of course, be either extinguished or diverted by act of parliament; and statute 5 & 6 W. 4, c. 50, contains, from section 84 to 92, copious directions as to the mode in which it may be stopped up or diverted by two justices. Those sections enact, that whenever the inhabitants, in vestry assembled, deem it expedient that a highway should be stopped, diverted, or turned, either entirely, or reserving a footway or bridle-way, the chairman shall, in writing, direct the surveyor to apply to two justices to view it and authorise him to pay the expenses of the view. Any inhabi-

tant [Reg. v. Maule, 41 L. J. M. C. 47, 23 L. T. N. S. 859] may call upon the churchwardens to assemble a vestry for this purpose. If it appears to the two justices, upon their view [which must be personal, R. v. Wallace, 4 Q. B. D. 641], that the highway may beneficially be stopped, diverted, or turned, and the owner of the land through which the new highway, [see Reg. v. Phillips, L. R. 1 Q. B. 648, in which case Welch v. Vash, 8 East, 394, was dissented from, is intended to be made, consent in writing, notices are to be affixed at the place and by the side of each end of the road, [see Reg. v. J.J. of Surrey, L. R. 5 Q. B. 466 | published for four weeks running in a county newspaper, and for four successive Sundays on the door of the church of each parish through which the highway runs; and when proof has been made, to the satisfaction of the justices, of the publication of such notices [the publication of which is therefore a condition precedent to the justices jurisdiction, Reg. v. Justices of Surrey, L. R. 5 Q. B. 466, 39 L. J. M. C. 494. and a plan has been laid before them of the old and the proposed new highways, the justices are to make their certificate, which is to be lodged with the clerk of the peace, and at the quarter sessions next after four weeks from the day of its being so lodged, is to be read in open court, and enrolled, together with the proof, plan, and consent, among the records of the quarter sessions. The stoppage or diversion of several highways connected with each other, may be effected by the same order and certificate.

Parties aggrieved by such certificate may appeal to the said quarter sessions, giving ten [increased by 12 & 13 Vict. c. 45, s. 1, to fourteen (see Reg. v. Moule, 41 L. J. M. C. 47) days notice, and a statement of the grounds of appeal. The court of quarter sessions is to empane, a jury to try this appeal, to decide it according to the verdict, and to award costs to the successful party. If there be no appeal, or the appeal be dismissed, the quarter sessions are to make an order for the diversion or stopping the old highway, and purchasing the ground for the new one, which henceforth is to be a public highway.

[As to the notice of the vestry meeting, see Reg. v. Powell, L. R. 8 Q. B. 403. The certificate of the justices for the diversion of a highway under sect. 85 may be granted if the new highway is either "nearer or more commodious" than the old one; see Reg. v. Phillips, L. R. 1 Q. B. 648, in which case an earlier and opposite decision of the Queen's Bench (Reg. v. Shiles, 1 Q. B. 919) was dissented from. It is sufficient if the certificate state the existence of the circumstances required by the section, Reg. v. Harvey, L. R. 10 Q. B. 46. (See Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 144, as to the substitution of the Urban Sanitary Authority for the Surveyors and Vestices in 5 & 6 Wm. 4, c. 50; and 41 & 42 Vict. c. 77, ss. 4 and 5, as to the substitution of the rural Sanitary Authority for Surveyors and Highway Boards.)

The 5 & 6 W. 4, c. 50, has been amended and extended by the 25 & 26 Vict. c. 61; and by sect. 44 of this latter act, which provides for the appointment of Highway Boards, all the provisions of the earlier act for widening, diverting, and stopping-up highways are made applicable to highways paved, repaired, or cleansed under any local or personal act, except highways, which any railway company, or the owners, &c., of any canal, river, or inland navigation, are liable to repair or cleanse under any act of parliament.

The Highway Act, 1864 (the 27 & 28 Vict. c. 101), and the 41 & 42 Vict. c. 77, also contain provisions, altering and amending the 5 & 6 W. 4, c. 50. It is not necessary to refer to these enactments at length. By sect. 21, however, of the former Act, it is provided that when any highway board con-

siders any highway to be unnecessary for public use, they may direct the district surveyor to apply to two justices to view it, and thereupon the like proceedings (including the appeal to quarter sessions, Reg. v. Justices of Surrey, L. R. 5 Q. B. 87; 39 L. J. M. C. 145) may be taken as where an application is made to stop up a highway under the 5 & 6 W. 4, c. 50, except that the order to be made thereon, instead of directing the highway to be stopped up, must direct that it shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly. The same section contains a provision enabling the court of quarter sessions to direct that the liability of the parish to repair shall revive, if it appears at any time thereafter, on the application of any person interested in the maintenance of the highway, that from any change of circumstances since the making of the order which freed the parish from liability, the highway in question has become of public use, and ought to be kept in repair by the parish, 41 & 42 Vict. c. 77, s. 24.

The Highways and Locomotives (Amendment) Act, 1878, 41 & 42 Vict. c. 77, contains in sect. 24 analogous provisions whereby, at the instance of any authority liable to keep any highway in repair, the Court of Summary Jurisdiction of the Petty Sessional Division may, after similar formalities, declare such highway unnecessary for public use, and that it ought not to be repaired at the public expense. There is also a like provision enabling the quarter sessions to direct that the liability of such highway to be repaired at the public expense shall revive.]

Besides the above enactments the Turnpike Acts contain provisions applicable to that class of ways only.

IV. As to the mode in which a highway is to be repaired. — At common law, the liability to repair all highways within a parish rests on the occupiers of the land therein, 1 Rolle's Abr. 390; Austin's Case, 1 Vent. 183, 9; R. v. St. George, Hanover Square, 3 Camp. 222; R. v. Netherthong, 2 B. & A. 179; [Cubitt v. Maxse, L. R. 8 C. P. 704; 42 L. J. C. P. 278; Reg. v. Bradfield, L. R. 9 Q. B. 552, where it was held that there was nothing in the fact of a road having been originally in 1789 set out in an inclosure award making it repairable by the adjoining landowners, to prevent it from becoming by dedication implied from user, a highway repairable by the inhabitants at large; and R. v. St. Benedict, 4 B. & A. 447, apparently to the contrary, is discussed.]

5 & 6 W. 4, c. 50, s. 27, regulates the mode in which a rate is to be made for that purpose, upon all property liable to be rated to the relief of the poor, and "such woods, mines, and quarries of stone or other hereditaments as have heretofore been usually rated to the highways," - that is to say, such woods, &c., as have been usually rated to the highways in the particular parish where the rate is made. Therefore, timber-woods, which had not for a number of years, before and up to the passing of the act, been rated to the highways in the parish in which they were situate, were held not to be rateable after the passing of the act, although similar woods had always been rated in the neighbouring parishes and country generally, R. v. Rose, 6 Q. B. 153. So that property may be rateable in one parish, to the repair of the highways. whilst the same description of property is not so rateable in another. Where a place happened to be extra-parochial, it seemed doubtful how the repair was to be enforced, R. v. Kingsmoor, 2 B. & C. 190; and see Reg. v. Midville, 4 Q. B. 240. [The 45 & 46 Vict. c. 27, extends certain provisions of the Poor Rate Assessment Act, 1869, to the Highway Rate.]

The liability of the parishioners may indeed be suspended, and the burden

imposed on other persons, under certain circumstances—But then, if those persons become in any way unable, or cease to be compellable, to perform the duty of reparation, the dormant liability of the parishioners revives, Young v.——, I Lord Raym, 725; R. v. Sheflidd, 2 T. R. 106; R. v. Oxfordshire, 4 B. & C. 194; Reg. v. Lordsmere, 15 Q. B. 689.

Nor can the parish, by any agreement whatever, exonerate itself from this inherent liability, R. v. Magor of Livergood, 3 East, 86.

By 4 & 5 Vict. c. 59 [amended by 34 & 35 Vict. c. 115, s. 15 and] continued by several acts, the last of which is [the 41 & 42 Vict. c. 62], justices at special sessions, on proof of the deticiency of the funds of any turnpike trust, may order a portion of the highway rate to be paid to the trustees, for the repair of such portion of the turnpike road as lies within the parish in which the rate is made; and the justices have power to make such an order, although the deficiency in the trust fund has been occasioned by payment of interest upon a pre-existing debt. See R. v. White, 4 Q. B. 101. [Weardall Highwan Board v. Brinbridge, L. R 1 Q B. 396, where R v. White was distinguished. See also Market Harbarangh Trustees v. Kettering Highway Board, L. R. S Q. B. 308; 42 L. J. M. C. 137; and Id. v. Market Harborough Highway Board, L. R. S Q B. 327; 42 L. J. M. C. 139. By 33 & 34 Vict. c. 73, s. 10, the cost of maintaining highways which cease to be turnpike roads is made a charge on the common fund of the highway district through which it passes. 35 & 36 Vict. c. 85, contains provisions (ss. 14, 15) for highway boards taking upon themselves the repairs of turnpike roads, and like provision is made by the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 148, with respect to urban authorities created under that Act.

By 41 & 42 Vict. c. 77, s. 13, the Highways and Locomotives (Amendment) Act, 1878, roads which since the last day of December, 1870, have ceased to be turnpike roads or will cease to be turnpike roads after the passing of the Act are to be deemed main roads, and half the expense of their maintenance is to be contributed out of the county rate on the certificate of the surveyor that such road has been maintained to his satisfaction. See on the construction of this section:— Mayor of Over Darwen v. Justices of Lancashire, 15 Q. B. D. 20; 54 L. J. M. C. 51; Grandiens of Ameslang v. Justices of Wills, 10 Q. B. D. 480; 52 L. J. M. C. 64; Justices of Lancashire v. Corpor tion of Rochdale, 8 App. Cas. 494; 53 L. J. M. C. 5; Justices of West Riding v. The Queen, 8 App. Cas. 781; 53 L. J. M. C. 41; Justices of Lancashire v. Newton Improvement Commissioners, 11 App. Cas. 416.

It is further provided by sect. 15 that under certain conditions the county authority shall declare certain ordinary highways to be main roads, and by sect. 16 the same authority may apply to the Local Government Board to declare that certain roads which by sect. 13 are constituted main roads ought not to become, or should cease to be such.

By sect. 7 of the same statute all expenses incurred by any highway board in keeping in repair the highways of each parish within their district shall be deemed to have been incurred for the benefit of the several parishes within the district, and shall be charged on the district fund. But if the highway board think it just that by reason of any exceptional circumstances any parish or parishes should bear the expense of maintaining their own highways, they may divide their district into parts, and charge exclusively on each of such parts (which must consist of more than one highway parish), the expenses payable by such highway board in respect of maintaining and keeping in repair the highways situate in each such part.]

The common law liability to repair all the highways situate within it, under which every parish lay, has been a good deal narrowed by statute 5 & 6 W. 4, c. 50, so far as respects roads constructed by private individuals, after the passing of that act.

The 23rd section, which is not retrospective, R. v. Westmark, 2 M. & R. 305, enacts that no road made by a private person or corporation, or set out as a private drift-way or horse-path by the award of inclosure commissioners, shall be deemed a highway repairable by the parish, unless three months' notice be given to the surveyor of the intention to dedicate, and unless it be substantially made, to his satisfaction, and that of two justices, who are to view and certify, and their certificate is to be enrolled at the next sessions. The surveyor, on receipt of the notice, is to call a vestry, and if they deem the new road not of sufficient utility, the question is to be determined by the next special sessions for the highways.

Hence it appears that the sort of dedication which shall suffice to entitle the public to a road, will, for the future, be different from that which must take place in order to burden the parish with the duty of repairing it. See R. v. Leake, 5 B. & Ad. 469; R. v. Wright, 3 B. & Ad. 683; R. v. Mellor, 1 B. & Ad. 32; Grand Surrey Canal Co. v. Hall, 1 M. & G. 393; and accordingly in Roberts v. Hunt, 15 Q. B. 17, it was held that a road dedicated to, and used by the public, is still a public highway, although the requirements of the 23rd section of the statute have not been complied with, so as to make it repairable by the parish; see also Fawcett v. York and North Midland Railway Co., 16 Q. B. 614 (a); [and R. v. Thomas, 7 E. & B. 399, where it was held that a non-compliance with the provisions of this section did not operate to relieve a parish from the liability to repair a road which had been originally made by turnpike trustees under a temporary act and had been used by the public, and repaired by the parish, both before and after the expiration of the act.

An appeal by the persons dedicating the highway lies to the quarter sessions against an order by justices, under this section, adjudging that a new road is not of sufficient utility to justify its being kept in repair by the parish, R. v. Justices of Derbyshire, 1 E. B. & E. 69.

Streets which become highways within districts to which the Public Health Acts have been applied, are placed by those statutes under the management and control of the sanitary authority. And when any street, not being a highway at the time when the Public Health Acts are applied to the district in which it is situated, is sewered, levelled, paved, flagged, and channelled to the satisfaction of the sanitary authority, the sanitary authority may, by notice in writing put up in the street, declare it to be a highway, and thereupon it becomes a highway repairable under the rates levied under these acts. The sole proprietor of the street, or if there is more than one, the majority in number of the proprietors, may, however, object by notice in writing to such declaration, and so interfere with the action of the sanitary authority. See sects. 68 and 70 of the 11 & 12 Vict. c. 63, and sect. 42 of the 21 & 22 Vict. c. 98, 38 & 39 Vict. c. 55, s. 149. Hesketh v. Local Board of Atherton, L. R. 9 Q. B. 4, 43 L. J. Q. B. 32. The term "highway," as used in the sections means highways "repairable by the inhabitants at large;" see the 15 & 16 Vict. c. 42, s. 13, which words are used in contra-distinction to "repairable by individuals ratione tenure," Gibson v. Mayor of Preston, L. R. 5 Q. B. 218; and see Hirst v. Halifax Local Board, L. R. 6 Q. B. 181, 40 L. J. M. C. 43.

It is by no means clear whether these provisions were meant to supersede altogether the enactments of the 23rd section of the 5 & 6 W. 4, c. 50, where

the new highways are urban highways or streets, or whether it was intended that, in cases of dedication by private persons or corporations, the machinery both of this act and of the Public Health acts should be applied. See Reg. v. Inhabs. of Dukinfield, 4 B. & S. 158.]

Special provisions have been made by the Legislature respecting the repair of roads which happen to pass along the boundary line of two parishes, so as to have one side in one parish, and the other side in another parish. See 5 & 6 W. 4, c. 50, ss. 58, 59, 60, 61; Reg. v. Perkins, 14 Q. B. 229.

It has been said that the common-law liability to repair highways, may be imposed on other persons than the parishioners at large under certain circumstances. These are—

1. Where the owner of the land through which a highway passes, incloses, in which case he becomes liable to repair as much of it as he has inclosed, Sir E. Duncombe's Case, Cro. Car. 366; the reason of this is that the inclosure prevents the public from exercising their right, which has been before spoken of, viz, that of going on the adjacent land when the highway is impassable; and the repairs to which he is subjected are stricter than the liability even of the parish, for the parish is only obliged to keep the road in the same state in which it has always been; whereas the person who has inclosed, is bound to maintain a perfect good way; and, if he do not, the public may justify making gaps in his inclosure, and going into his grounds as far as is necessary to avoid the bad way, Henn's Case, Sir W. Jones, 296; see R. v. Flecknow, Burr. 461, and 3 Salk. 182; also the observations of Abbott, C. J., in Steele v. Prickett, 2 Stark, 468, et seq. He may, however, get rid of his liability by destroying his inclosures. R. v. Stoughton, 2 Wms. Saund. 160, note 12. When there is an ancient inclosure on one side of a road, and the owner of the land on the other side incloses it, he shall maintain the whole way, R. v. Stoughton, 2 Wms Saund. 161, note; if there be no such ancient inclosure, he shall only repair half the way, R. v. Stoughton, 1 Sid. 464; where two inclose, they shall repair the way in moieties, ibid.; and see 2 Wms. Saund. 161, in notis.

[It may be mentioned here that the owner of land is under no legal obligation to fence an excavation in it, unless it is made so near to a public road or way as to constitute a public nuisance, Hounsell v. Smyth, 7 C. B. N. S. 731; and when a person dedicates a way to the public, he restricts himself in the use of the adjoining land only to this extent: he cannot make any use of the land which renders the way dangerous to persons who are upon it, and using it, for this would be derogating from his grant. He is not, however, bound to fence the adjoining land, even though it contain an excavation, nor is he liable to a person who strays from the road and is injured by falling into the excavation, unless it substantially adjoins the highway so as to constitute a nuisance. See the judgment of the Court of Exchequer in Hardcastle v. The South Yorkshire Railway Co., 4 H. & N. 67. See also Barnes v. Ward, 9 C. B. 392; and Binks v. The South Yorkshire Rail. Co., 3 B. & S. 244.

In *Hadley* v. *Taylor*, L. R. 1 C. P. 53, the occupier of an unfurnished warehouse adjoining a highway was held liable for not fencing a "hoisthole" within 14 inches of the highway, used to raise goods from the cellar to the upper floor of the warehouse.

A person who uses any part of a highway in an unreasonable manner to the special damage of an individual passing along it is liable to an action. As, for instance, if he leave a van and steam plough or a roller on the grassy side of a highway, whereby a horse is frightened, although the obstacle did not

project into the *via trita* sufficiently to obstruct the passage there. *Harris* v. *Mobbs*, 3 Ex. D. 268; *Wilkins* v. *Day*, 12 Q. B. D. 110; see also *Fritz* v. *Hobson*, 14 Ch. D. 542, 49 L. J. Ch. 321.

But a private individual cannot of his own authority abate a nuisance in a public highway unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway, *Dimes v. Petley*, 15 Q. B. 276; *Arnold v. Holbrook*, L. R. 8 Q. B. 96, 42 L. J. Q. B. 80; *Denney v. Thwaites*, 2 Ex. D. 21.

It is the duty of persons diverting a highway under statutory powers to take proper precaution by fencing, or otherwise, to protect passengers at the point of diversion; *Hunt* v. *Taylor*, 14 Q. B. D. 918, 54 L. J. Q. B. 310.

We have already seen (ante, p. 167) that if a highway is dedicated to the public with a dangerous obstruction on it, or excavation in it or near it, no action can be maintained against the person dedicating for an injury caused thereby.

2. The burthen of repair may be cast on a particular person by prescription; this prescription, if alleged against a corporation, may be general (see R. v. Birmingham and Gloucester Railway Co., 3 Q. B. 223, where the question was discussed whether an indictment for non-repair would lie against a corporation, and held that it would; and see R. v. Great Northern Railway Co., 9 Q. B. 315); but, if alleged against an individual, some consideration for it must be shown, ex gr., the having lands holden by such service, 1 Hawk. P. C. c. 76, s. 8. See R. v. Kerrison, 1 M. & S. 435; 13 Rep. 33; Bac. Abr. Highway, F.; R. v. St. Giles, 5 M. & S. 260; and Priestley v. Foulds, 2 M. & G. 175. And when lands holden by such charge are conveyed to several, the charge is not apportioned among them, but each is liable to the whole repairs, and must have contribution from the others, Regina v. Duchess of Bucklugh, 1 Salk. 358; R. v. Buckeridge, 4 Mod. 48; 3 Vin. Abr. Apportionment, 5, pl. 9.

[So if there can be a prescriptive liability of one parish to repair highways in another parish, which is doubtful, it can not arise except on sufficient consideration, *Reg.* v. *Ashby Folville*, L. R. 1 Q. B. 213. As to exemption by immemorial custom, see *Reg.* v. *Rollett*, L. R. 10 Q. B. 469.]

Whether the obligation to repair a highway ratione tenura must of necessity be immemorial, has been doubted. But see R. v. Hayman, Moo. & M. 402; and per Taunton, J., R. v. Middlesex, 3 B. & Ad. 210. See the able argument of Mr. Cresswell on this subject, in R. v. Scarisbrick, 6 A. & E. 513, where he contends that the true rule is that a highway is primâ facie presumed to be immemorial; and therefore the origin of obligation must usually be so too. But that where the origin of the road can be shown, so may that of the obligation; and he refers to Mayor of Lyme Regis v. Henley [3 B. & Ad. 77, 1 Bing. N. B. 222], to show that such an obligation is capable of a modern origin.

The obligation to repair ratione tenuræ seems to be enforceable in the first instance against the occupier, who is the only person known to the public, and who has his remedy over against the owner, Baker v. Greenhill, 3 Q. B. 148; and quære, whether the owner of lands bound to repair ratione tenuræ is liable to be indicted as such though he be not in occupation, and the lands be occupied by another; see R. v. Sutton, 3 A. & E. 597, where lands so charged with repairs were occupied by the guardian in socage of an infant eleven years old, who had inherited them: it was held: 1. that the infant was not indictable as owner: 2. that the guardian was.

The liability to repair, whether arising ratione tenuræ, or otherwise, is at

an end when the road has been totally destroyed by the act of God; as, for instance, when it has been washed away by the action of the sea, Reg. v. Bamber, 5 Q. B. 279; Reg. v. Hornsea, 23 L. J. M. C. 59; Dearsley C. C. R. 291, S. C.; [but see Reg. v. Greenhow, 1 Q. B. D. 703, as to what amounts to the act of God.]

If a road had been widened, the mode of doing which is now provided by 5 & 6 W. 4, c. 50, s. 82, the parish must at common law have repaired the new part thereof, R. v. West Riding of Yorkshire, 2 East, 353; st. 4, G. 4, c. 95, s. 68. But now, when a road is widened, diverted, or turned, the parish must repair the whole: and means are provided for enforcing a rateable contribution from the persons previously liable to the reparation, 5 & 6 W. 4, c. 50, s. 93. And see 4 G. 4, c. 95, and R. v. Inhabitants of Barton, 11 A. & E. 343.

By sect. 62 of the said act, a mode is chaiked out of converting a highway, repairable by a corporation, or individual, into a parish highway, and fixing the compensation to be paid by the party to be relieved from the *onus* of repairing.

3. The inhabitants of a particular township within a parish, may, by custom, be bound to repair the highways lying within its own boundary, R. v. Eccles@ibl., 1 B. & A. 34s; although it is not proved affirmatively that there are, or have been, ancient highways in the township, R. v. Barnoldswick, 4 Q. B. 499; Reg. v. Ardsley, 3 Q. B. D. 255. In like manner, a parish may, by immemorial custom, be charged with the repair of a bridge instead of the county, R. v. Hendon, 4 B. & Ad. 62s; but [probably] not with the repairs of a highway out of its own boundary, R. v. St. Giles, 5 M. & S. 260; R. v. Machynlleth, 2 B. & C. 166; [Reg. v. Ashby Folville, L. R. 1 Q. B. 213.]

By such a custom the township is placed on the same footing as a parish, with respect to the highways within it, whether new or old, R. v. Hedfield, 4 B. & A. 75; R. v. Eastrington, 5 A. & E. 765; R. v. Heage, 2 Q. B. 132; Reg. v. Ardsley, 2 Q. B. D. 255; so a particular tything may be liable by enstom to repair the roads within it, Reg. v. East Mark, 11 Q. B. 877. See 5 & 6 W. 4, cap. 50, sect. 5.

See further, as to highways, and particularly as to pleadings relating to them, the notes to R. v. Stoughton, 2 Wms. Saund. 462: and as to bridges, see stats. 22 H. 8, cap. 5; 43 G. 3, cap. 59, sect. 5; and 5 & 6 W. 4, cap. 50, sects. 21 & 22. [Reg. v. Upper Half Hundred of Chart, L. R. 1 C. C. R. 237; 38 & 39 Vict. c. 55, s. 147; 41 & 42 Vict. c. 77, ss. 21, 22; Reg. v. Somersetshire, 38 L. T. 452.]

The above observations have, to avoid confusion, been confined to highways over land. But it is clear that the channels of public navigable rivers were always highways. See Mayor of Colchester v. Brooke, 7 Q. B. 339, to which case the reader is referred, as containing much useful information upon the extent of the rights of the public in navigable tidal rivers. [See also Atty.-Gen. v. Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. 335; Same v. Terry, L. R. 9 Ch. 423; Original Hartlepool Collieries Co. v. Gibb, 5 Ch. D. 713, 46 L. J. Ch. 311. If a permanent obstruction be placed in a navigable river, the persons entitled to use the river as a highway may remove it, Eastern Counties Railway Co. v. Dorling, 5 C. B. N. S. 821.]

Up to the point reached by the flow of the tide the soil was presumably in the crown; above that point, whether the soil at common law was in the crown or in the owners of adjacent lands, was a point perhaps not free from doubt; there was at least a jurisdiction in the crown to reform and punish nuisances therein. It was therefore at common law illegal to erect weirs, &c., so as to obstruct the channel. Those prior to Edward the First's reign are, however, legalised by the construction of 25 Edw. 3, c. 4, which provided for the destruction of those levied subsequently, Williams v. Wilcox, 8 A. & E. 314. [Rolle v. Whyte, L. R. 3 Q. B. 286, 37 L. J. Q. B. 105; Leconfield v. Lonsdale, L. R. 5 C. P. 657, 39 L. J. C. P. 305.]

What is a highway? — A public highway is one under the control of, and kept up by, the public, and must either be established in a regular proceeding for that purpose, or generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities. See Kennedy v. Williams, 87 N. C. 6. "The primary and fundamental object of all public highways is to furnish a passage-way for travellers in vehicles or on foot, through the country;" Kuger, C. J. in People v. Squire, 107 N. Y. 593.

Highways how created. — First, a highway may be created by the voluntary act of the owner of the soil, provided such dedication of land by its owner is accepted by the public, acting through its proper representatives. To establish a public way by act of the owner, two circumstances must unite. In the first place, that owner must clearly dedicate the land to the use of the whole people; in the second place, that people must accept the land so dedicated to them; Cook v. Harris, 61 N. Y. 448; Rozell v. Andrews, 103 N. Y. 150; Booraem v. North Hudson County Railway Company, 39 N. J. Eq. 465; In re Alley, 104 Pa. St. 622; Bell v. City of Burlington, 68 Iowa 296; Shellhouse v. State, 110 Ind. 509; Kennedy v. Williams, 87 N. C. 6; Morse v. Zeize, 34 Minn. 35; Hayward v. Manzer, 70 Cal. 476; Mayberry v. Standish, 56 Me. 342; Parsons v. Trustees, 44 Ga. 529; Scott v. Cheatham, 12 Heiskell 713; Folsom v. Town of Underhill, 36 Vt. 580; McCain v. State, 62 Ala. 139.

What is an act of dedication? — It is ordinarily a question of fact whether the act of the land-owner constituted a dedication. The thing to be sought after is whether he disclosed an apparent intention to devote his land to the public use. What his secret intention may have been is not so much to be considered as the intention he disclosed to all the world; City of Indianapolis v. Kingsbury, 101 Ind. 200. It will be difficult, therefore, if not impossible, to lay down any one rule applicable to all cases. Each individual case will have to be decided by itself.

taking into consideration all the attendant circumstances, the condition of the respective parties, and the acts, declarations, and intentions of the land-owner as manifested by his conduct. For it is largely on the ground of an estoppel in pais that the principle of dedication rests. See Vanatta v. Jones, 13 Vroom 561; Cook v. Harris, 61 N. Y. 448; State v. Otoe County, 6 Nebraska 129; City of Indianapolis v. Kingsbury, 101 Ind. 200. But no particular formality is necessary in order to show dedieation; Morgan v. Chicago & Alton R. R. Co., 96 U. S. 716. It may be by parol; Cook v. Harris, 61 N. Y. 448; Harding v. Jasper, 14 Cal. 642; Baker v. Pratt, 15 Ill. 568; Dover v. Fox, 9 B. Monroe 200; Carter v. Portland, 4 Oregon 339. In fact, any act or conduct of the land-owner showing an intention to dedicate will be sufficient; Chicago v. Wright, 48 Ill. 285; McCormick v. Mayor, 45 Md. 512; Ruch v. Rock Island, 97 U. S. 693; Pierpoint v. Town of Harrisville, 9 W. Va. 215; Atkinson v. Bell, 18 Texas 474; Connehan v. Ford, 9 Wisconsin 240; Crump v. Mims, 64 N. C. 767; Livermore v. Maquoketa, 35 Iowa 358; Mansur r. Haughey, 60 Ind. 364; Case r. Favier, 12 Minn. 89; Penquite v. Lawrence, 11 Ohio St. 274. Yet certain acts of a land-owner have been held to constitute a strong, if not conclusive, presumption of an intention to dedicate. Perhaps the most common case is that of one selling lots of land or house on a map, a plat with a road running by them, and designated as a street. It is held that this is the strongest evidence of dedication. See Matthiessen & Hegeler Zinc Co. r. City of La Salle, 117 Ill. 411; Rathman v. Norenberg, 21 Nebraska 467; Eastland v. Fogo, 66 Wisconsin 133; Fulton v. Town of Dover, 6 Central Reporter 848 (Court of Chancery of Delaware); City of Indianapolis r. Kingsbury, 101 Ind. 200; In re Opening of Pearl St., 111 Pa. St. 565; Hawley v. Baltimore, 33 Md. 270; Clark v. City of Providence, 10 R. I. 437; Briel v. City of Natchez, 48 Miss. 423; Tinges v. Mayor, 51 Md. 600; Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61. But see Cent. Land Co. v. City of Providence, 1 New England Rep. 873.

So a dedication of land can be made subject to a right to designate a portion thereof for use for railroad purposes, and when such portion has been devoted to railroad purposes the public use will be suspended as long as that portion is used for railroad purposes; Ayres v. Penn. Ry. Co., 19 Vroom 44. And wherever dedication on a condition, the condition must be fulfilled before

the dedication becomes operative; Creamer v. McCune, 7 Mo. Ap. 91; St. Louis v. Meier, 77 Mo. 13; Broughner v. Clarksburg, 15 W. Va. 394. But merely opening a space or taking down a fence will not be a dedication; Rozell v. Andrews, 103 N. Y. 150; Bowers v. Suffolk Man. Co., 4 Cush. 332; People v. Jones, 6 Mich. 192; Barker v. Clark, 4 N. H. 383; Saulet v. City, 10 La. Ann. 81; Cyr v. Madore, 73 Me. 53. And see, also, Gowen v. Philadelphia Exc. Co., 5 W. & S. 141; Valentine v. Boston, 22 Pick. 75; Smith v. State, 3 Zab. 130; White v. Bradley, 66 Me. 254. A dedication may be revoked before acceptance; Cook v. Harris, 61 N. Y. 448. But when accepted it is irrevocable; Shanklin v. City of Evansville, 55 Ind. 240; City v. Canavan, 42 Cal. 541.

Who may dedicate and what can be dedicated. — Having considered what will effect a dedication, it will now be necessary to consider who may make such dedication and what property can be so dedicated. Only the owner of the soil can dedicate it to the public; Kennedy v. Williams, 87 N. C. 6; Bangan v. Mann, 59 Ill. 492; Harding v. Town of Hale, 83 Ill. 501; City of Hannibal v. Draper, 36 Mo. 332; McBeth v. Trabue, 69 Mo. 642. Hence an executor could not make a dedication; Paret v. Bayonne, 11 Vroom 333. But if the will authorized him to he might; Kaime v. Harty, 73 Mo. 316. Nor could a mortgagor unless the mortgagee assented; Hoole v. Attorney General, 22 Ala. 190. A corporation may make a dedication; Williams v. N. Y. & N. H. R. R. Co., 39 Conn. 509; Story v. N. Y. E. Co. R. R., 90 N. Y. at p. 145. But a mere occupier of government lands cannot; Smith v. Smith, 34 Kan. 293; Gentleman v. Soule, 32 III. 271. Nor a person under a disability; State v. O'Laughlin, 19 Kansas 504. A trustee may dedicate in accordance with the trust; Prudden v. Lindsley, 29 N. J. Eq. 615.

The fact that the way is not open at both ends will not prevent it from being capable of dedication. A cul de sac may become a highway; People v. Kingman, 24 N. Y. 559 (overruling Holdane v. Cold Spring, 23 Barbour 103); People v. Jackson, 7 Mich. 451; Sheaff v. People, 87 Ill. 189; Vandemark v. Porter, 40 Hun 397; Bartlett v. Bangor, 67 Me. 460; State v. Bishop, 39 N. J. 226; Schatz v. Pfeil, 56 Wis. 429. Land may be dedicated for public squares; Abbott v. Cottage City, 143 Mass. 521; Methodist Episcopal Church v. Hoboken, 4 Vroom 13; Rowan v. Portland, 8 B. Mon. 232; Princeville v.

Auten, 77 Ill. 325; Mowry v. City of Providence, 10 R. I. 52. A dedication must be to all the public; Mowry v. City of Providence, 10 R. I. 52; Tupper v. Hudson, 46 Wis. 646; Trerice v. Barteau, 54 Wis. 99.

What is acceptance by the public? - In considering the other branch of the question, it will again appear that it is mainly a question of fact whether the dedication by the land-owner was followed by that acceptance on the part of the public which it has been seen is necessary to constitute the land a highway. Here, too, each case must be determined by its own circumstances. As land need not be dedicated by its owner in any particular manner, so the acceptance need not be proved by any one act. Still, it is somewhat easier to specify what will be an acceptance than what a dedication. There are certain acts so clear and unequivocal as to leave no doubt of an acceptance, the expenditure of money on a road, paving it, repairing it, and all such acts, the proper municipal authorities indicating that they have assumed control of the land, are unmistakable evidence of acceptance by the public; State v. Eisele, 33 N. W. Reporter, 785; People v. Lochfelm, 102 N. Y. 1; Ross v. Thompson, 78 Ind. 90; Parsons v. Trustees, 44 Ga. 529. It is from the very fact that this liability of a town to repair the highways attaches that clear evidence of acceptance is necessary; Bowers v. Suffolk Man. Co., 4 Cush. 333; Hyde v. Jamaica, 27 Vt. 443. So, too, a long continued use of the road by the public will be sufficient evidence of acceptance; indeed, this long continued use with the knowledge of the land-owner would be strong evidence of the dedication as well as the acceptance; Elv v. Parsons, 55 Conn. 83; Veale v. City of Boston, 135 Mass. 187; Brakken v. Minneapolis Ry. Co., 29 Minn. 41; People v. Blake, 60 Cal. 497; People v. Loehfelm, 102 N. Y. 1; Carr v. Kolb, 99 Ind. 53; Com. of Pa. v. Moorehead, 10 Central Rep. 611; Kinnare v. Gregory, 55 Miss. 612; City v. Canavan, 42 Cal. 541; Buchanan v. Curtis, 25 Wis. 99; Ross v. Thompson, 78 Ind. 90. But see Peyton v. Shaw, 15 Ill. Appeals 192, where twenty-years user was held not conclusive evidence of dedication.

Abandonment of highways.— A public highway may be given up and lost by discontinuance. To decide whether there has been an abandonment, we must consider all the facts and all the action of the public. The public may, of course, release their easement to travel over another's land and in such case the

land will revert to the abutting owner unless he claims through one who has clearly reserved the ownership of the fee in himself. Adopting one road to travel on and ceasing for a long time to use another may operate as a discontinuance; Shelby v. State, 10 Hump. 165; Grube v. Nichols, 36 Ill. 92; Railroad v. O'Conner, 37 Ind. 95; Webber v. Chapman, 42 N. H. 326. But until the road is actually needed for use, non-user will not show a discontinuance; State v. Leaver, 62 Wis. 387; Reilly v. City of Racine, 51 Wis. 526. So if the road has been fenced up and improved by the owner of the land for over twenty years, it will be evidence of abandonment; Holt v. Sargent, 15 Gray 97. But the city cannot abandon a part of a street for twenty years, allow the adjoining owner to use it for that time, then provide it shall revert to the city; Glasgow v. City of St. Louis, 87 Mo. 678. As a result of the doctrine that the highway belongs to the abutting owners, subject to the public use of it for the ordinary purposes of a highway, comes the other rule of law established in a larger part of the states that a conveyance of land having as one of its bounds "to a street," "to the highway," or some equivalent term, will convey the fee to the centre of the street, unless the language of the description is so qualified as to show clearly that the soil of the highway is reserved from the grant by the grantor; Matthiessen & Hegeler Zine Co. v. City of La Salle, 117 Ill. 411; City of Indianapolis v. Kingsbury, 101 Ind. 200; Bliss v. Ball, 99 Mass. 597; Palmer v. Dougherty, 33 Me. 507; Peck v. Denniston, 121 Mass. 17; Kings County Fire Insurance Co. v. Stevens, 87 N. Y. 287, when Andrews, C. J., says, "It is generally conceded that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is that the grantor did not intend to retain the highway, and such reservation will not be adjudged, except when it clearly appears from the language of the conveyance that such reservation was intended;" Hamlin v. Pairpoint Mass. Co., 141 Mass. 51; Hegar v. Chicago & N. W. R. R., 26 Wis. 624; Paul v. Carver, 26 Pa. St. 223; Spackman v. Steidel, 88 Pa. St. 453; Nichols v. Suncook Man. Co., 34 N. H. 345; Witter v. Harvey, 1 McCord, 67; Chatham v. Brainerd, 11 Conn. 69; Champlin v. Pendleton, 13 Conn. 23; Johnson v. Anderson, 18 Me. 76; Adams v. Saratoga & Washington Railroad Co., 11 Barbour

414; Florida Southern Ry. Co. v. Brown, 1 Southern Reporter, 512; Rich v. City of Minneapolis, 35 N. W. Rep. 2. Yet the grantor can reserve the soil of the highway to himself by using clear language. What will amount to such a reservation is a question of some difficulty and there is a diversity in the decisions of the different states. In Massachusetts and in New York the presumption of title extending to the centre of the street seems to be one more easily rebutted than in the other states. By legislation the fee of the soil in almost all the streets in New York city is vested in the city. In English v. Brennan, 60 N. Y. 609, it is stated that the presumption that the grantor intended to convey his interest in the street is much less strong in large cities. In Munn v. Worrall, 53 N. Y. 44, an exception "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has or have been lawfully taken for a public road or roads" was held sufficient to rebut the presumption of a conveyance of the fee. In Kings Co. Fire Ins. Co. r. Stevens, 87 N. Y. 287, where the description was beginning at a point on the southerly side of road running thence southerly, thence westerly, thence northerly to the road, thence along said road to the point or place of beginning, it was held that the grant was bounded by the southerly side of the road and did not extend to the centre of the highway. Yet in Vail v. Long Island R. R. Co., 106 N. Y. 283, where land was conveyed to a town with the usual covenants of warranty "to be used as a highway, with all the privileges thereto belonging, for such purpose only, with the appurtenances and all the estate, title, and interest of the said parties of the first part therein," it was held that the deed conveyed the fee of the land and not the easement merely. In Hamlin v. Pairpoint Man. Co., 141 Mass. 51, a description "to the land of Howland street and thence easterly in line with said street" was held not to convey to the centre of the street. In Sibley v. Holden, 10 Pickering 249, a description beginning at a stake on the southerly side of a road, thence to said road, thence by said road easterly, was held to exclude the highway. In Smith v. Slocomb, 9 Gray 36, a similar description was held to exclude the highway. For other cases where the description was held to rebut the presumption of an intent to carry title to the centre of the highway, see Baltimore & Ohio R. R. Co. v. Gould, 7 Central Reporter 379 (Court of Appeals of Maryland); Jackson v. Hathaway, 15 Johns. 447; Wetmore v. Law, 34 Barber 521; Sunderland v. Jackson, 32 Me. 83; White's Bank of Buffalo v. Nichols, 64 N. Y. 65; City of Chicago v. Rumsey, 87 Ill. 348; Hughes v. Providence & Worcester R. R., 2 R. I. 508; Highee v. C. & A. R. R., 19 N. J. Eq. 276; Wellman v. Dickey, 1 New Eng. Rep. 342 (Supreme Court of Maine).

Ownership of soil of highway.—Ordinarily the soil of the highway belongs to the abutting property. The interest which the public has in the highway is a right of way on land of another for public travel while the abutting property owner still retains his proprietorship of the soil, subject, however, to the right of the public to its undisturbed use in such manner as public streets are usually used. For authorities holding that the ownership of the fee of the soil in a highway remains in the owner of the land, see Town of Winchester v. Capron, 63 N. H. 605; Robert v. Sadler, 104 N. Y. 229; Pittsburgh Railway Co. v. Commonwealth, 104 Pa. St. 583; Webber v. Eastern Railway Co., 2 Metcalf 147; Tucker v. Eldred, 6 R. I. 404; Woodruff v. Neal, 28 Conn. 165; Town of Old Town v. Dooley, 81 Ill. 255 (where the right to get water from springs flowing along the highway was denied).

It would, of course, be competent for the municipal authorities to take the fee of the land, as well as an easement over it if they so elected. But in order to rebut the presumption that an easement merely was taken, strong and conclusive evidence would be required. In New York city in almost all the streets the city does own the fee, but the act authorizing them to take such fee expressly provides that they shall hold the same in trust to keep the streets open as streets.

The interest the public has in a highway. — Highways are designed to facilitate travel to and fro, and communication between different points. For this purpose, and for this purpose only, are they constructed and operated. It has been seen that the ownership of the soil is, except in special cases, in the abutting owner. Hence, subject to this easement of the public, the land in the highway is his. The late decision of the Court of Appeals, of New York, in Robert v. Sadler, 104 N. Y. 229, brings out clearly this right of ownership of the abutting owner and is valuable in reviewing the authorities. It was a case where pits were dug in the sidewalk to obtain gravel to fill up

the roadway. In other words, gravel of the owner was taken, to be replaced by poorer and cheaper gravel. The court held this a trespass and vigorously upheld the right of the adjoining owner.

Horse railroads and steam railroads. - With the introduction of horse railroads a new and important question came before the state courts. Were the public authorities justified in granting to private corporations the right to use the streets for their railroad? The land-owner whose property had been taken in invitum for the purposes of a highway had been duly compensated. But did such compensation have in contemplation such a new and novel use of the highways as this? With general unanimity it has been decided that a horse railroad is but a legitimate use of the highway; Hinchman r. Paterson Horse R. R. Co., 17 N. J. Eq. 75; Elliot r. Fair Haven & Westville R. R. Co., 32 Conn. 579; Attorney-General v. Metropolitan R. R., 125 Mass. 515; Market St. R. R. Co. v. Central Railway, 51 Cal. 583; Ohio Street Railway v. Cumminsville, 14 O. St. 523; Briggs v. Lewiston & Auburn Horse R. R. Co., 4 New England Reporter 546 (Supreme Court of Maine) in which case the fact that the cars were to be run by electric motor was held to make no difference. A New York case lays down a contrary ruling; Craig v. Rochester City & Brighton R. R. Co., 39 N. Y. 404. The court say, "The use of a railroad no matter how operated, whether by horse or steam power, necessarily includes to a certain extent an exclusive occupation of a portion of the highway and a permanent occupation of the soil." Yet the same court soon afterwards held in Kellinger v. Forty-second Street & Grand St. Ferry R. R. Co., 50 N. Y. 206, that where the city owned the fee of the soil the abutting property owner was not damaged. See, also, Mahady v. Bushwick R. R., 91 N. Y. 148; and People v. Kerr, 27 N. Y. 188.

A steam railroad is generally regarded as a use of the highway not within the contemplation of the parties when the land was taken, and so not a legitimate use of the highway. The New York courts have uniformly laid down the doctrine that to permit a railroad operated by steam to use the highway is to impose on the land a new and additional burden to the easement of the public, and entitles the land-owner to additional compensation; Williams v. N. Y. Cent. R. R., 16 N. Y. 97; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Uline v. N. Y. C.

& H. R. R. Co., 101 N. Y. 98; where Earl, J., says: "If the railroad be built upon or over a highway the public right or license must be obtained not only, but so far as individuals' own private rights or interests in the highway or the soil thereof, they must also be lawfully acquired; . . . as to them and their rights the railroad is unlawful, a continuing nuisance which they can cause to be abated." In his dissenting opinion in Pierce v. Drew, 136 Mass. 75, Mr. Justice C. Allen says that in Massachusetts it is an open question whether a railroad could be laid on the highway without indemnifying the owner of the fee.

In accord with the New York decisions are Grand Rapids & Indiana R. R. Co. v. Heisel, 38 Mich. 62; Stanley v. City of Davenport, 6 N. W. Rep. 706; Hegar v. Chicago & N. W. R. R., 26 Wis. 624; I. B. & W. R. R. Co. v. Hartley, 67 Ill. 439; Kaiser v. St. Paul, S. & T. Falls R. R. Co., 22 Minn. 149; Kucheman v. C. C. & D. R'y. Co., 46 Iowa 366, a case containing a valuable review of the authorities. C. G. & B. R. R. Co. v. Renfroe, 58 Mo. 265.

Opposed to the New York cases are Brainard v. The Missisquoi R. R. Co., 48 Vt. 107; Colorado Cent. R. R. Co. v. Mollandin, 4 Colorado 154. See, also, the elaborate opinion of E. Redfield, C. J., in Hatch v. Vermont Cent. R. R. Co., 25 Vt. 59. And for a general collection of the authorities, see Pierce on Railroads, pp. 232 to 242.

Elevated railroads, underground roads, telegraph poles, gas pipes. - We are confined to the jurisprudence of one state for all our law on the subject of elevated railroads; but the decisions in New York were so cautiously and carefully considered that they will doubtless obtain in other jurisdictions when similar roads are constructed there. By Story v. N. Y. Elevated Railroad Company, 90 N. Y. 122, it was established that the erection of an elevated railroad fifteen feet above the surface of the street, supported upon columns placed along the outer edge of the sidewalks, was destructive of the use of the street as such, and would violate the state constitution, unless compensation was made to plaintiff for his property thus taken. See opinion of Danforth, J., at p. 161: "The public purpose of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water pipes, and upon it posts for lamps. Of these things an abutting owner could not complain, but he is not required to hold his peace in the

presence of such an erection as is threatened by the defendant." The case of Lahr v. The Metropolitan Elevated Railway Company, 104 N. Y. 268, while reaffirming the principle of law laid down by the majority of the court in the Story case, also settles definitely that it does not affect the right of the abutting owner to recover damages that he owns only an easement in the street, not the fee. As to whether abutting owners on streets, not opened under the Act of 1813, where the city owns the fee, can similarly recover damages or maintain an action for an injunction, there can be little doubt, if the point is ever seriously urged as a defence by the elevated railroad companies, that the principle laid down in the two cases cited will be followed, and all abutting property owners be allowed a remedy provided they can show any injury to their property. But it must still be regarded as an open question whether an abutting owner can recover for injury to his property due to noise. Two courts of equal standing have reached opposite conclusions on this point, and, until settled by the court of last resort, the matter must remain a mooted one. See Peyser v. Metropolitan Elevated Railway Co., 13 Daly 122, where noise was held to be but an ordinary use of the street; Taylor v. Metropolitan Elevated Ry. Co., 55 N. Y. Superior 555, allows a recovery.

The New York Court of Appeals has very recently rendered a decision by which it would appear that the construction of an underground railway may be a violation of the rights of an abutting property-owner in the Matter of N. Y. District Ry. Co., 107 N. Y. 42.

Telephone poles. — There is great diversity in the few decisions on the question whether a telephone company can be given the right to use the highway for the erection of its poles without compensating the adjoining property owners. In Pierce v. Drew, 136 Mass. 75, the matter is elaborately discussed, and the majority of the court say that this would not be the imposition of a new burden on the land already taken for the use of the public. Two judges dissent in a strong and carefully considered opinion. In accord with Pierce v. Drew are the cases, Julia Building Association v. Bell Telephone Company, 13 Mo. App. 477; and in Dusenbury v. Mutual Telegraph Co., 11 Abb. N. C. 440; and Tiffany v. The U. S. Illuminating Co., 67 How. Pr. 73, special term decisions of two New York courts have denied this right, and this is more noticeable because in one, at least, of the

cases the abutting property owner did not own the fee of the street. Board of Trude Telegraph Co. v. Barnett, 107 Ill. 507, decides that the abutting property owner must be compensated where he owns the fee of the street.

The municipal authorities have the right to authorize gas companies to lay their pipes in the soil of the highway, and to lay water pipes and to build sewers; Commonwealth v. Lowell Gas Light Co., 12 Allen 75, where Bigelow, C. J., says: "The right which the defendants have is only to use land, the whole benefit of which has been previously taken from the owner and appropriated for a public use, in such manner that no nuisance shall be committed, no disturbance be created in the easement of the public, and no injury done to abutting owners of private property." See, also, Traphagen v. Mayor, etc., of Jersey City, 29 N. J. Eq. 206; Cone v. City of Hartford, 28 Conn. 363; Milhau v. Sharp, 15 Barbour, remarks of Edward, P. J., at p. 210: "No one has ever seriously questioned the right of the city to authorize their use for such purpose;" yet in Bloomfield Gas Light Co. v. Calkins, 62 N. Y. 386, it has been decided that in a country town there would be a right of compensation.

Various other obstructions to the highway. — The use of the highway, by both the public and abutting property owners, must be a reasonable use with due regard to the rights of all parties. As highways are established for public travel and convenience, the public enjoyment of them is strictly limited to their legitimate purpose. On the other hand, the owner of property on the highway owes correlative duties to the public. As he is entitled to be protected against obstructions on the highway by the public, and against the public appropriating to itself any part of the highway, so the public, too, is to be protected in a reasonable use of the highway devoted to them. What is an obstruction to the highway must largely depend on the circumstances of each individual case arising, on the question whether considering the locality and the public need the use is a fair and legitimate use by the public of their easement, or whether the use of his property by the adjoining owners has a due regard for the rights of the public.

In Callanan v. Gilman, 107 N. Y. 360, a tradesman was in the habit of using a bridge to convey goods from his store to the street, and the sidewalk would be obstructed from four to five hours of each business day. It was held that this was an unrea-

sonable use of the sidewalk and constituted a nuisance. In Elias v. Sutherland, 18 Abb. N. C. 126, it was held an unreasonable use of their premises for the "Seven Sutherland Sisters" to use the bay window of their store on a busy, bustling street in New York City, for combing their long hair in full view so as to collect great crowds in front of their premises and interfere with travel on the highway. In Branahan c. Hotel Co., 39 Ohio St. 333, it was held that the defendant had no right to use the street fronting on plaintiff's premises by keeping coaches there so as to interfere with his house. See, also, McCaffrey v. Smith, 41 Hun 117, and Turner v. Holtzman, 54 Md. 148; In Jacques v. National Exhibit Co., 15 Abb. N. C. 250, it was held unlawful to exhibit comic pictures in a second story window so as to attract a great crowd on the opposite side of the street, and interfere with plaintiffs' business. Nor can the highway be used for pasturing; Stackpole v. Healy, 16 Mass. 33; Parker v. Jones, 1 Allen 270; Baldwin v. Ensign, 49 Conn. 113.

Any permanent obstruction cannot be erected in the highway. -What is such an obstruction is a question of fact. A work of art may be erected in a highway if it does not obstruct travel; Tompkins v. Hodgson, 2 Hun 146; a watch-house cannot, Town of Winchester v. Capron, 63 N. H. 605; nor can weigh scales, Huddleston r. Killbuch, 7 Atlantic Reporter, 210 (Supreme Court of Pa.). A scaffold may be temporarily erected for the repair of a building; Hexamer v. Webb, 101 N. Y. 377; State v. Holman, 29 Ark. 58. And see on kindred points, Chamberlain v. Enfield, 43 N. H. 356; and Mallory v. Griffey, 85 Pa. St. 275. A liberty pole is lawful; City of Allegheny v. Zimmerman, 95 Pa. St. 287. See, also, Graves v. Shattuck, 35 N. H. 257. For a case of moving a building through the highway; Welsh v. Wilson, 101 N. Y. 254. For a case of use of skid to bring goods to one's store, and for a later skid case, see Jochem v. Robinson, 66 Wis. 638.

Rivers. — The law as to rivers both above and below the flow of the tide is the same as that of a highway, so far as the easement of passing of the public is concerned; Chalker v. Dickinson, 1 Conn. 382; so far as relates to the ownership of the soil is concerned, other principles come in. In rivers where the tide ebbs and flows, the adjoining owner can claim only to low water mark, all beyond that belongs to the public; Hart v. Hill, 1 Whart, 124; Ball v. Slack, 2 Id. 508; Dillingham v.

Roberts, 75 Me. 469; Home v. Richards, 4 Coll. 441; Mead v. Haynes, 3 Rand. 33; Arnold v. Mundy, 1 Halst. 1; Ashby v. Eastern R. R. Co., 5 Met. 368; Jones v. Janney, 8 W. & S. 436; Bickel v. Polk, 5 Harr. 325; Musser v. Hershey, 42 Ia. 356. As to the ownership beyond low water mark, see State v. Pacific Guano Co., 22 S. C. 50; State v. Pinckney, 22 Id. 484; Goodwin v. Thompson, 15 Lea 209; Naglee v. Ingersoil, 7 Pa. St. 185; Chapman v. Kimball, 9 Conn. 38. In California high water mark is made the dividing line, leaving the land between high and low water mark in the public; Long Beach Land & Water Co. v. Richardson, 70 Cal. 206. In Iowa the same rule seems to hold; Houghton v. C. D. & M. R. R. Co., 47 Ia. 370. In Missouri the ownership extends only to the water's edge; Meyers v. City of St. Louis, 8 Mo. Ap. 266. Low water mark is strictly the dividing line in the other states; McCullock v. Aten, 2 Hamm. 308; Garner's Case, 3 Gratt. 655; Handly v. Anthony, 5 Wheat. 375; Litchfield v. Scituate, 136 Mass. 39. See Gough v. Bell, 1 Zab. 156; 2 Zab. 441. If the owner extend his structure beyond this mark he is guilty of a purpresture which may be abated as a nuisance; East Haven v. Hemingway, 7 Conn. 186. See Union Depot Street R. R. Co. v. Brunswick, 31 Minn. 297; and Sisson v. Cummings, 35 Hun 22; Gifford v. McArthur, 55 Mich. 535; Larson v. Furlong, 63 Wis. 323. The owner can prevent any obstruction being placed between his land and the navigable way; Shirley v. Bishop, 67 Cal. 543; Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51.

Above the flow of the tide different rules apply, the public still has the right of passage, but no right to fish, nor to elaim the soil that belongs up to the middle of the stream to the abutting owners; People v. Platt, 17 Johns. 195; Hooker v. Cummings, 20 Id. 90; Browne v. Kennedy, 5 Harr. & J. 195; Comm. Canal Fund v. Kempshall, 26 Wend. 404; Munson v. Hungerford, 6 Barb. 265; Gavit v. Chambers, 3 Hamm. 496; Mariner v. Schulte, 13 Wis. 692; Canal Trustees v. Haven, 5 Gilm. 548; Morgan v. Reading, 3 Sm. & M. 366. As to right of passage, see Adams v. Pease, 2 Conn. 481; Berry v. Carle, 3 Greenl. 269; McCullough v. Wall, 4 Rich. 69; Moor v. Veazie, 31 Me. 361; Warren v. Thomaston, 75 Id. 329. The law as to purpresture is the same as in tide water rivers; Kean v. Stetson, 5 Pick. 492; Ex parte Jennings, 6 Cow. 578; People v. Canal Appraisers, 13 Wend. 355. Islands follow the same law as

though the water covered them, they belong to the public or the abutting owner according to whether they are tide washed or not; Middletown v. Sage, 8 Conn. 222; Claremont v. Carleton, 2 N. H. 369; Greenleaf v. Kilton, 11 Id. 531; Lunt v. Holland, 14 Mass. 149; Ingraham v. Wilkinson, 4 Pick. 268. See apparently contra, Penn. Coal Co. v. Winchester, 109 Pa. St. 572; The middle of the stream is exactly half way across without respect to depth; McCullough v. Wall, 4 Rich. 84.

An ordinary grant accordingly passes the title to the middle of the stream; Morrison v. Keen, 3 Greenl. 474; Sleeper v. Laconia, 60 N. H. 201; Lincoln v. Wilder, 29 Me. 169; King v. King, 7 Mass. 496; Jackson v. Louw, 12 Johns. 252; Noble v. Cunningham, 1 McMull. Eq. 289; Norcross v. Griffiths, 65 Wis. 599. This of course may be restricted by apt words; Dunlap v. Stetson, 4 Mas. 349; Jackson v. Halstead, 5 Cow. 216; Hayes v. Bowman, 1 Rand. 417. This restriction is implied where the public transfers land bordering on the stream; R. R. Co. v. Schurmeir, 7 Wall. 282; Yates v. Milwaukee, 10 Id. 504; Serrin v. Grefe, 67 Iowa 196; Wood v. Fowler, 26 Ka. 682. Usually apt words are needed to create the restriction; it must be express; McCullough v. Wall, 4 Rich 84; Arnold v. Elmore, 16 Wis. 509; Hegar v. C. & N. R. R. Co., 26 Id. 624; Wash. Ice Co. v. Shortall, 101 Ill. 46; Piper v. Connelly, 108 Id. 646; Muller v. Landa, 31 Tex. 265; Attorney-General v. Evart Booming Co., 34 Mich. 462; Fletcher v. Thunder Bay River Boom Co., 51 Id. 277; June v. Purcell, 36 Ohio St. 396; Day v. P. Y. & C. R. R. Co., 44 Id. 406; Luce v. Carley, 24 Wend. 451. Although some cases hold that the intention is to be sought from the whole deed; Hatch v. Dwight, 17 Mass. 289; Litchfield v. Ferguson, 141 Id. 97; Sanders v. McCracken, Hard. 258; Hall v. Whitehall Water Power Co., 103 N. Y. 129.

What shall be taken to be apt words of exclusion is a question still open for discussion. In Child v. Starr, 4 Hill 369, the words "to the Genesee River thence along the shore of said river," &c., were held to be words of exclusion, as also are the words "to the bank of the creek" in Halsey v. McCormick, 3 Kern. 297. See to same effect, Lincoln v. Wilder, 29 Me. 169. "To the river or any part of the river on which the island doth abut" conveyed only to high water mark; New York v. Hart, 95 N. Y. 443. On the other hand, the words "up to the river" were held not to exclude in Greenleaf v. Kilton, 11

N. H. 531. See Carter v. Ch. & O. R. R., 26 W. Va. 644. "High water mark" does not fluctuate with the advancing or receding shore line; Nixon v. Walter, 41 N. J. Eq. 103. The line runs at right angles to the stream from the extremities of the land to the middle of the stream; Knight v. Wilder, 2 Cush. 200. See, also, Turner v. Parker, 14 Or. 340. See Morris v. Beardsley, 54 Conn. 338, for the rule as to seashore.

The law as to ponds and lakes not connected with the salt water is the same as in the case of tide waters, the ownership goes only to the water's edge; State v. Gilmanton, 9 N. H. 461; Wood v. Kelley, 30 Me. 47; Bradley v. Rice, 13 Id. 198; Stevens v. King, 76 Id. 197; Wheeler v. Spinola, 54 N. Y. 377; Canal Comms. v. People, 5 Wend. 446; Champlain & St. L. R. R. Co. v. Valentine, 19 Barb. 484. See Hodges v. Williams, 95 N. C. 331, which says an isolated lake, although large, is not navigable, and a riparian owner is not entitled to land made by a withdrawal of the water. In the states of Alabama, Iowa, Michigan, Mississippi, North Carolina, Pennsylvania, West Virginia, and some other states the navigable rivers are treated as tide waters; Bullock v. Wilson, 2 Port. 436; Moore v. Sanborne, 2 Mich. 520; Stover v. Jack, 60 Pa. St. 339; Shrunk v. Schuylkill Nav. Co., 14 S. & R. 71; Ravenswood v. Flemings, 22 W. Va. 52; Wood v. Chicago R. I. & P. R. Co., 60 Iowa 456; Carson v. Blazer, 2 Binn. 475; Comm. v. Fisher, 1 P. & W. 462; Wilson v. Forbes, 2 Dev. 30; Comm. v. Withers, 29 Miss. 39; see Wilson v. Welch, 12 Or. 353. This applies only to navigable rivers; Ingram v. Threadgill, 3 Dev. 59; Coovert v. O'Conner, 8 Watts 470.

In tide waters the ownership of the soil is to low water mark, but this is not absolute. The owner must not create a purpresture there, for the easement of the public extends to high water mark; he may, however, do anything which will not interfere with this easement; Stover v. Jack, 60 Pa. St. 338; Wainwright v. McCullough, 63 Id. 66; Zug v. Commonwealth, 70 Id. 138; Charlestown & S. R. R. Co. v. Johnson, 73 Ga. 306. The public may enter, from a boat, the unenclosed flats between high and low water marks, and from them fish in the sea; Packard v. Ryder, 144 Mass. 440; see Bedlow v. N. Y. Floating Dry Dock Co., 44 Hun 378.

For the definition of the word navigable it is necessary to go to the cases. In The Montello, 20 Wall. 430, the court said,

"Rivers are navigable, in fact, when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is navigable when it forms by itself or its connections with other waters a continuous highway, over which commerce may be carried on."

A stream which will float logs to market is navigable; Olson v. Merrill, 42 Wis. 203; Shaw v. Oswego Iron Co., 10 Or. 371. But if only at high water it is not; Lewis v. Coffee County, 77 Ala. 190; contra, Smith v. Fonda, 64 Miss. 551. The common law test of navigability, viz., tide water, has never been adopted in Pennsylvania; Stover v. Jack, 60 Pa. St. 338. It need not be navigable continuously at all seasons of the year; Walker v. Allen, 72 Ala. 456. The Niagara is a navigable river in spite of the falls; Re State Res-Comms., 37 Hun 537. The natural formation of sand bars and accumulation of timber will not render it not navigable if it once was navigable; Goodwill v. Bossier, 38 La. An. 752; see Burroughs v. Whitwam, 59 Mich. 279.

ELWES v. MAWE.

MICH. -43 G. 3, K. B.

[REPORTED 3 EAST, 38.]

A tenant in agriculture, who erected, at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine; but where it is accessory to the realty, it can in no case be removed.

THE declaration stated, that the plaintiff was seised in fee of a certain messuage, with the out-houses, &c., and certain land, &c., in the parish of Bigby, in the county of Lincoln, which premises were in the tenure and occupation of the defendant as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, &c., intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof wrongfully and injuriously, and without the licence and against the will of the plaintiff, pulled down divers buildings, parcels of the said premises, in his the defendant's tenure

and occupation, riz., a heast-house, a carpenter's shop, a warrenhouse, a fuel-house, and a pigeon-house, and a brick wall inclosing the fold-yard, and took and carried away the materials, which were the property of the plaintiff, as landlord, and converted them to his the defendant's own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial at the last Lincoln assizes a verdict was found for the plaintiff, with 60l. damages, subject to the opinion of the court on the following case:—

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, out-houses, and lands, at Bigby, in the county of Lincoln, under a lease from the plaintiff for twentyone years, commencing on the 12th day of May, 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said messuage, barn, stables, and outhouses, and other buildings belonging to the said demised premises. About fifteen years before the expiration of the lease the defendant erected upon the same farm at his own expense a substantial beast-house, a carpenter's shop, a fuel-house, a carthouse, and pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections were meessary and convenient for the occupation of the farm, which could not be well managed without them. The question for the opinion of the court was, Whether the defendant had a right to take away these erections. If he had, then a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

This case was first argued in Easter Term last by *Torkington* for the plaintiff, and *Clarke* for the defendant; and again in this term by *Vaughan*, Serjeant, for the plaintiff, and *Balguy* for the defendant.

For the plaintiff it was argued that the removing the buildings in question was waste at common law, and that this case

did not fall within any of the exceptions, which had been introduced solely for the benefit of trade in relaxation of the old rule. That rule was, that whatever was once annexed to the freehold could never be severed again without the consent of the owner of the inheritance. Accordingly, glass windows, wainscot, benches, doors, furnaces, &c., though annexed by tenant for years for his own accommodation, could not be removed by him again, Co. Litt. 53 a. The principle on which this was founded was the injury which would thereby arise to the inheritance from disfiguring the walls of the mansion; though some of these things were in their nature personal chattels, supplying the place of mere moveable utensils and furniture. never was questioned but that buildings let into the soil became part of the freehold, from the very nature of the thing. This was decided so long ago as Hil. 17 Ed. 2, 518, in a writ of waste against a lessee, who had built a house and pulled it down during his term. And Co. Litt. 53 a, which is to the same purpose, goes further and says, that even the building of such new house by the tenant is waste; but that is denied in Lord Darcy v. Askwith (a); though that also agrees that the letting down of such new house built by the tenant himself would be waste. So taking down a stone wall, or a partition between two chambers, is waste. 10 Hen. 7, 2, pl. 3. It does not, indeed, appear by that book, whether those erections had been before made by the tenant himself: but they were so taken to be by Mead, J., in Cooke v. Humphrey (b). All this is confirmed by Lord Coke at the end of Herlakenden's Case (c), where it is said to have been adjudged in C. B. that glass fastened to the windows, or wainscot to the house, by the lessee, cannot be removed by him: and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws or iron put through the posts or walls (as had been then of late invented), or in whatever other manner it was fastened to the posts or walls of the house. In all these cases the rule as between landlord and tenant seems to have followed that between heir and executor, founded upon the reason first mentioned: and no innovation upon the strict rule seems ever to have been admitted, except in the case before Lord C. B. Comyns (d) at Nisi Prius, of the

⁽a) Hob. 234.

⁽b) Moor, 177.

⁽c) 4 Rep. 63, 4.

⁽d) Cited in Lawton v. Lawton, 3 Atk. 13, 16.

cider-mill, which he held should go to the executor, and not to the heir; but upon what particular grounds does not appear: and the case of Culling v. Tuinell (a), before Lord Ch. J. Triby, at Hereford, in 1694, where a barn erected by a tenant upon pattens and blocks of timber, lying on but not let into the ground, was holden to be removable by the tenant: but even there he relied on the custom of the country in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted (b). The only established exception (which the plaintiff's counsel admitted was as old as the rule itself) is in favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In 20 Hen. 7, fo. 13, pl. 24, an heir brought trespass against executors for taking away a furnace fixed to the freehold with mortar, and the taking was holden tortious. But it was there said "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business (c), during the term he may remove them: but if he suffer them to be fixed to the land after the end of the term, then they belong to the lessor; and so of a baker." Then follows, "It is no waste to remove such things within the term by any." But this is said to have been against the opinions before mentioned, and to have been doubted in the 42 Ed. 3, p. 6, pl. 19, whether it were waste or not. It is clear, therefore, from the whole of the passage, that the only generally admitted exception was in favour of traders, which is shown by the examples of the dyer and baker affixing vessels pur occupier son occupation: and that at least it was doubtful whether the same privilege extended to others affixing to the freehold similar articles. And the exception is the more remarkable because at that early period agriculture must have been of much greater importance to the state than trade. This distinction was continued in later times. In Poole's Case (d), M. 2 Ann., in an action on the case by a lessee against the sheriff of Middlesex, who had taken in execution the vats, coppers, tables, partitions, and pavement, &c., of an under lessee, a soap-boiler, which he had put up as fixtures for the convenience of his trade, Lord C. J. Holt held that during the term the soap-boiler might well re-

⁽a) Bull. N. P. 34.

⁽b) See Wigglesworth v. Dallison, ante, vol. i. et notas.

⁽c) The words in the original are "pur occupier son occupation."

⁽d) Salk. 368.

move the vats set up in relation to trade, by common law; but that there was a difference between what he did to carry on his trade, and what he did to complete the house; as hearths and chimney-pieces; which he held not removable. The next case was Cave v. Cave (a), in 1705, where the Lord Keeper held that not only wainscot, but pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor, to prevent the house being disfigured. Then followed Lawton v. Lawton (b), where it was decreed by Lord Hardwicke, C., that a fire-engine erected for the benefit of a colliery by the tenant for life should be considered as personal estate, and go to his executor, and not to the remainderman, in favour of creditors. But there it was proved to be customary to move such an engine; that in building the shed for its security holes were left for the ends of the timber to make it more commodious for removal; and that it was very capable of being removed. evidence relied on by the other side was, that it could not be removed without tearing up the soil and destroying the brickwork. But Lord Hardwicke considered the brickwork there as a mere accessory to the engine, which in its own nature was a mere personal moveable chattel. One reason, he said, which weighed with him was, that it was a mixed case, between enjoying the profits of the land and carrying on a species of trade; and considering it in that light, it came near the instances of furnaces and coppers in brewhouses. That decision was in 1743. In Ex parte Quincey (c), in 1750, where the principal question was whether the utensils of a brewhouse passed by a mortgage of the brewhouse with the appurtenances; it is said that a tenant may, during the term, take away chimney-pieces and even wainscot; but the latter is observed to be a very strong case. The same was before said in Lawton v. Lawton, with this difference, that it was there said of wainscot, fixed only by screws and of marble chimney-pieces. This opinion may have proceeded, as it did in Beck v. Rebow (d), upon the consideration that matters of this sort were merely ornamental furniture, and not necessary to the enjoyment of the freehold. The case of Lord Dudley v. Lord Ward (e), in 1750, was like that of Lawton v. Lawton, on the authority of which it was de-

⁽a) 2 Vern. 508.

⁽b) 3 Atk. 13.

⁽c) 1 Atk. 477.

⁽d) 1 P. Wms. 94.

⁽e) Ambl. 113, and Bull. N. P. 34.

cided. There Lord Hardwicke recognised the general rule, with the single exception, as between landlord and tenant, that fixtures annexed by the latter for the sake of trade might be removed. There, too, the fire-engine was considered as the principal, and the building erected over to preserve it as the mere accessory: and the colliery itself as in part the carrying on of a trade. In Lawton v. Salmon, E. 22 Geo. 3, B. R. (a), salt pans were holden to go to the heir and not to the executor: and though Lord Mansfield said that the rule had been relaxed as between landlord and tenant, tenant for life and remainderman, in respect of things put up by the tenant in possession; still he confined the relaxation to things so affixed for the benefit of trade. And he there alluded to the case of the cider-mill (doubtingly) as standing alone, and not printed at large. Then the case of Dean v. Allalley (b), sittings after Easter, 39 Geo. 3, was a case where two sheds called Dutch barns, which had been erected by the tenant during his term were removed by him: and being sued on his covenant, by which he undertook to leave all buildings which then were, or should be erected on the premises during the term in repair, Lord Kenyon, at Nisi Prius, held that buildings of that description were not included; and said that the law would make the most favourable construction for the tenant where he had made necessary and useful erections for the benefit of his trade or manufacture. Of what precise description the buildings there were does not appear; possibly not affixed to the ground (c), at least not such parts as were removed. If not, the case amounts to not more than that of Penton v. Robart (d), where a varnish-house of wood, which had been erected on a brick foundation by the tenant for the purpose of carrying on his trade was removed by him. But it did not appear there that the foundation was removed, but only the superstructure of wood, which had been brought by the tenant from another place, where he had before carried on his business. Lord Kenyon, indeed, there laid stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting green-houses, &c., which he considered that they would

⁽a) Cited in a note to Fitzherbert v. Shaw, 1 H. Blac. 259. The principal case turned on a particular agreement

⁽b) 3 Espin. Ni. Pri. Cas. 11.

⁽c) Vide post, what account was given of this case in the arguments of the defendant's counsel.

⁽d) 2 East, 88.

be at liberty to remove. Whether that be done under particular agreements or not does not appear: but supposing the law would imply an exception in favour of tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade; the very nature of their occupation and of the letting, being to enable them to disannex even trees from the land (a). But none of the cases have gone the length now contended for: and the very grounds on which exceptions have been made from the general rule preclude the present case. Erections of this sort are not in their nature temporary or moveable, but are calculated solely for the enjoyment of the land: the expense of erecting them is great, and their value is great on the spot, but of trifling consideration when removed: the injury of their removal, therefore, is much greater to the landlord than the benefit of the materials when removed is to the tenant. If the exception were extended to buildings erected for the purposes of agriculture, it would be as extensive as the rule itself, and would therefore destroy it. The sole object of such erections is for the purpose of enjoying the produce of the land; the land therefore is the principal, and the building the accessory to the land. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the personal chattel is the principal. No other line than this can be drawn without overthrowing all the authorities.

For the defendant it was contended that the old rule of law had been gradually relaxed between landlord and tenant, though not so much between tenant for life and remainderman, or between heir and executor. The object has been to encourage tenants to lay out their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the state as well as the individuals, and applies at least as strongly to tenants in husbandry as in trade. Agriculture, in the improved state in which it is now carried on, is in itself a trade; it requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of

(a) Lawrence, J., on the first argument intimated, that if ground were let expressly for nursery ground it might be considered as implied in the terms of the contract, that it was to be used for taking up young trees,

&c., as is usual in such cases. But he expressed a wish to be informed of the usual terms of the leases under which such grounds were holden in the neighbourhood of the metropolis. modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to market. But unless the ten int is entitled to take away with him at the end of his term, or have a compensation in value for buildings like these in question, erental in such a manner as to be capable of being removed at pleasure and set up on any other farm, he will not be at the expense of erecting them at all; and therefore though he, and through him the public, will suffer, yet the landlord will not be the better for the right which he now claims. This is no quastion whether permanent additions or improvements made by a tenant to an old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation, are to be removed at the end of the term; for not even poisons renting premises for the purpose of carrying on trades have any such privilege: but whether buildings so creeted for the sole purpose and convenience of carrying on the num, that is, of turning to the best account the capital and industry of the farmer in his trade or busine s, may not be rumoved by him. The materials of which the buildings are composed cannot vary the law, but the objects and interests of the persons concerned. If in the case Dean v. Allalley (a), the tenant was entitled to remove the buildings called Dutch burn, the same rule will apply to the buildings in question, which are as much calculated for removal. For in that case (as appears from the MS. note of one of the counsel in the cause), the sheds eregted "had a foundation of brick in the ground, and uprights fixed in and rising from the brickwork, and supporting the root, which was composed of tiles, and the sides open," as in the present case. If the exception be comined to erections for the benefit of trade, Lord Kenyon in that case considered the Intel Larens as coming within that description. This is consonant to the opinion delivered by the same learned judge in Penton v. Robart (b). It is true that was the case of a rarnish-house; but it is clear that his lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for in the instances put by him in illustration of his opinion, are cases of gardeners and nurserymen, whose profits are derived out of the immediate produce of the land; and the buildings now in question are no more annexed to the soil than

⁽a) 3 Espin. Ni. Pri. Cas. 11, and MS.

the varnish-house there was, which was on a foundation of brick, or than the hothouses and greenhouses of the persons alluded to. But the argument does not rest alone on very modern cases, but is strongly supported by the decisions of Lord Hardwicke in the cases of Lawton v. Lawton (a) and Lord Dudley v. Lord Ward (b). There, even as between tenants for life or in tail and the remaindermen, the executors of the former were holden entitled to the fire-engines of collieries; buildings which must in their very nature be annexed to the soil, and without which the profits of the land, viz., the coal, could not be taken. Those were, indeed, said to be mixed cases between taking the profit of land and carrying on a trade; but wherefore mixed does not so plainly appear. So the case of the cider-mill is directly in point: that is as essential to the enjoyment of the land in that particular species of produce out of which the cider is to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture-land. That case was much stronger than what is now contended for; the question arising there between the heir and executor, where it may be admitted that the old rule has prevailed much stricter. All the cases therefore in the books between persons standing in that relation may well be laid out of the question, as they turn upon the presumed intention of the ancestor or testator in favour of the heir, that the inheritance should descend to him entire and undefaced. But the case of Culling v. Tufnell (c), before Lord Ch. J. Treby, which is in point, was between landlord and tenant. That was the case of a barn removed by the tenant: and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It is true that case was put by him on the ground of the custom of the country, but Buller J. in citing it, observes that now, without any custom, it would be determined in favour of the tenant without any difficulty; for that the old rule had been relaxed as between landlord and tenant, &c., though still preserved as between heir and executor. No distinction is there hinted at between trade and agriculture. In Fitzherbert v. Shaw (d) the question, it is true, turned at last on the agreement; but Gould, J., was decidedly of opinion at the trial,

⁽a) 3 Atk. 13.

⁽b) Ambl. 113.

⁽c) Bull. N. P. 34.

⁽d) 1 H. Black. 258.

that if the tenant had removed the buildings during the term, he would have been justified in so doing; and there some of the things removed were a shed built on brickwork, and some posts and rails erected by the tenant, all which must have been let into the ground, and were adapted to purposes of agraulture Upon the whole, they contended that the only line to be drawn from all the books was, that whatever buildings worn erested by a tenant (be the materials what they may, or however placed in or upon the ground), for the immediate purposes of his trade, or for the more advantageous taking or improving the profits of his farm, he may remove them again, provided he leave the premises on his quitting as he found them. Adoording to this rule no injury could ensue to the landlord, whose property would, on the contrary, be eventually benefited by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

Cur. ale, cult.

Lord Ellenborough, C. J., now delivered the opinion of the Court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant, who had held under a term for twenty-one years a farm consisting of a messuage and lands, out-houses, and barns, &c., thereto belonging, and who, as the case reserved stated, during the term and about fifteen years before its expiration, erected at his own expense a beast-house, a corpenter's shop, a fuel-house, a cart-house, a pump-house and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front and supported by brick pillars. The fold-gard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials; leaving the premises in the same state as when he entered upon them. The case further stated that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the court was, Whether the defendant had a right to take away these erections? Upon a full consideration

of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of the opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. 1st. Between different descriptions of representatives of the same owner of the inheritance; viz., between his heir and executor. In this first case, i.e., as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. 2ndly, Between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claimant in respect of freehold or inheritance, is the case between landlord and tenant.

But the general rule on this subject is that which obtains in the first mentioned case, i.e., between heir and executor; and that rule (as found in the Year-book, 17 E. 2, p. 518, and laid down at the close of Herlakenden's Case, 4 Co. 64, in Co. Litt. 53; in Cooke v. Humphrey, Moore, 177, and in Lord Darcy v. Asquith, Hob. 234, in the part cited by my brother Vaughan, and in other cases), is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year-book, 42 Edw. 3, 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year-book of the 20 Hen. 7, 13 a & b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or

vessels to overpy his overpathen, during his teem by may remove them: but if he satter them to be here i to the earth with the to m. then they belong to the lessor. And so of a jaker. And it is not waste to remove such things within the term by some, and this shall be against the opinions aforesaid." But the rule in this extent in tayour of tenants is doubted afterwards in 21 Hen. 7. 27, and narrowed there, by allowing that the lessed for yours could only remove, within the term, things fixed to the ground, and not to the walls of the principal building. However, in process of time the rule in favour of the right in the tenant to remove utensils set up in relation to trade became fully estable lished: and accordingly we find Lord Halt, in Pade's Cisc. Salk, 368, laving down (in the instance of a soup-boiler, an under-tenant, whose vats, coppers, &c., fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriffs, that during the teem the sumplather might well remove the vats he set up in relation to tende; and that he might do it by the common law, and not by virtue of any special custom, in favour of trule and to encourage implastry; but that after the term, they became a gitt in law to him in reversion, and were not removable. He adds, that there was a difference between what the soap-boller did to carry on his trade, and what he did to complete his house, as hearths and chimneypieces, which he held not removable. The indulgence in favour of the tenant for years during the term, has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Beck v. Rebow, 1 P. Wins, 91; Ex Parte Quincry, 1 Atk. 477; and Lawton v. Lawton, 3 Atk. 13. But no adjudged case his vet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them, during his term.

In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor, as between him and the heir, the Court, in the three principal cases on this subject (viz., Lawton v. Lawton, 3 Atk. 13, which was a case of a fire-engine to work a colliery erected by tenant for life: Lord Dudley v. Lord Ward, Ambler, 113, which was also the case of a fire-engine to work a colliery erected by

tenant for life (these two cases before Lord Hardwicke); and Lawton, executor, v. Salmon, E. 22 G. 3, 1 H. Black. 259, in notis, before Lord Mansfield; which was the ease of salt pans, and which came on in the shape of an action of trover brought for the salt pans by the executor against the tenant of the heir at law), may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fireengine in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade." And in the case in 3 Atk. he says, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade: and considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers." Upon the same principle, Lord C. B. Comyns may be considered as having decided the case of the eider-mill, i.e., as a mixed case between enjoying the profits of the land and carrying on a species of trade; and as considering the cider-mill as properly an accessory to the trade of making cider.

In the case of the salt pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade; but as merely the means of enjoying the benefit of the inheritance. He says, "the salt spring is a valuable inheritance, but no profit arises from it unless there be a salt work; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance." Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant, on the ground of their being such utensils of trade; still it would not have affected the

question now before the Court, which is the right of a tenant for mere agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever; and to which description of buildings no case (except the Nisi Prius case of Dean y. Allalleg, before Land Kenyon, and which did not undergo the subsequent review of himself and the rest of the Court), has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's Misi Prius, 34, of Culling v. Tutnell, before Lord Ch. J. Treby, at Nisi Prins, he is stated to have holden that the tenant who had erected a barn upon the premises, and put it upon patterns and blocks of timber lying about the ground, but not but in or to the ground, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures: "they were not find in or to the ground." In the case of Fitzherbert v. Shaw, 1 H. Black. 258, we have only the opinion of a very learned Judge indeed, Mr. Justice Gould, of what would have been the right of the tenant, as to the taking away a shed built on brickwork, and some posts and rails which he had erected, if the tenant had done so during the term: but, as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at Nisi Prius: and, when that question was offered to be argued in the Court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of Penton v. Roburt, 2 East, 88, it was the case of a rarnish-house, with a brick foundation let into the ground, of which the woodwork had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade; and the tenant was entitled to the same indulgence in that case which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning which obtains in modern times in favour of the interests of trade, upon which ground it might be properly supported,

goes further, and extends the indulgence of the law to the erection of greenhouses and hothouses by nurserymen, and, indeed, by implication, to buildings by all other tenants of lands: there certainly exists no decided case, and, I believe, no recognised opinion or practice on either side of Westminster Hall, to warrant such an extension. The Nisi Prius case of Dean v. Allalley (reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, 2 vol. 11), is a case of the erection and removal by the tenant of two sheds called Dutch barns, which were, I will assume, unquestionably fixtures. Lord Kenyon says, "The law will make the most favourable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills, and other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term." Lord Kenyon here uniformly mentions the benefit of trade, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognised as a known allowed exception from the general rule which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants to the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation at all: and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronouce that the defendant had no right to take away the erections stated and described in this case.

Poster to the plaintiff

The word tetror, it has been remarked by a superiodition is seen by different writers to express a first open to the seen to Mark War 175, where it was held the open to Mark War 186. In Mother y Lander 1 C. M. 18. 270, then come to be made to Mark War 186. In Mother y Lander 1 C. M. 18. 270, then come at sold to Mark War 186. In Mother y Lander 1 C. M. 18. 270, then come at sold the form fixtures has acquired the periodic model to the set of the first address who annexed to the freehold out public are more one is the difference of the greek with the court, in that case, thought that neither were they greeks, properly six along a country to Mark War 197. Attendigm, 4 Mark Wars, 1 Lander Mark War 198. 4 Mark Wars, 1 Lander Mark War 198. 4 Mark Wars, 1 Lander Mark War 198. 4 Mark Wars, 1 Lander Mark Wars, 1 Mark War 198. 4 Mark Wars, 1 Lander Mark War 198. 4 Mark War 1

It seems difficult, however, to use the term "flatures" invariably in the above sense without products and continuous for the distribution meaning of the word the same fails within the persons, and not factors as is an indicated in the purposes of this note to use to word the purposes of this note to use to word the best at the best to be its natural and most within a sense to be its natural and most with

By the expression name of to the footbone is meant fastened to or connected with it: mere juxta-position, or the laying of an object, however heavy, on the freehold, does not amount to annexation. Thus in the case cited in the text from Bullet's Nat Prins at all radius y. I grade where a tenant had erected a barn in a grown and bloods at the last in the manufic but not find in, or to the grower, it was to I that be intight take their more it the end of his term. This was said it Bulker to have here, by the custom of the country; but the Lord C J remarks in the text - To be some he might. and that without any custom, for the forms of the fall and article the first loing considered as fetures. They Anthony v. Harrys and Harris s Bug 180 Houry Bull of her Mar Davis v. James, 2 B & A 165, and Williaking v. O. mall, 1 L. & B will where it was held that a granary resting upon stickles which were built into the ground, but not attached to them except by its weight, was not a fixture in the ordinary sense of the word, so as to pass under the term "fixtures" in a conveyance.

In the case of Hellowell v I astrone's Exch 295, a question arose as to whether certain machinery used for manufacturing purposes was attached to the freehold so as to be exempt from distress for rent. The machines consisted of "mules" used for spinning certain fixed sonic by means of serves into the wooden floors of the mill, and some by being sunk into the stone flooring and secured by molten lead. The court held that they had never become part of the freehold, and Parke, B., in delivering the judgment of the court said, "they were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves; and

the object and purpose of their annexation was not to improve the inheritance but merely to render the machines steadier and more capable of convenient use as chattels." See also *Huntley* v. *Russell*, 13 Q. B. 572, [and *Waterfall* v. *Penistone*, 6 E. & B. 876, in which case the court acted upon the rule laid down in *Hellawell* v. *Eastwood*. In the judgment in *Mather* v. *Fraser*, 2 Kay & J. 536, Wood, V.-C., fell into the mistake of imagining that the reasoning of Parke, B., in *Hellawell* v. *Eastwood*, was unnecessary because, as the Vice-Chancellor supposed, tenants' fixtures are distrainable for rent: a not unnatural error.

In Walmsley v. Milne, 7 C. B. N. S. 115, the owner of land mortgaged it, and afterwards erected buildings on it, to which, for the more convenient use of the premises in his business, he affixed a steam-engine and boiler, a hay-cutter, and corn-crusher, and a pair of grinding-stones. It appeared that the lower grinding-stone was boxed on to the floor, and that the steam-engine and other articles (except the boiler) were fastened by bolts and nuts to the walls and floors, but were all capable of being removed without injury either to themselves or to the premises. Under these circumstances, the court held that all the disputed articles formed part of the freehold, and could not be claimed by the assignces in bankruptcy of the mortgagor, even although if the relation of landlord and tenant had existed, these articles might have been removed during the term. "Without expressing any opinion on Hellawell v. Eastwood," said the court, "it is sufficient to observe that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at bar are not fixtures forming part of the freehold; for we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance and not for any temporary purpose."]

There are indeed some cases of what is called constructive annexation, i.e., cases in which an object, really a chattel, is, for certain purposes annexed to the freehold. Thus in Liford's Case, 11 ('o. 50, we find the law laid down as follows:—"It is resolved in 14 H. 8, 25 b, in Wistow's Case, that if a man has a horse-mill, and the miller takes the mill-stone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had always been lying upon the other stone, and by consequence, by lease, or conveyance of the mill, shall pass with it. [See the judgment in Walmsley v. Milne, 7 C. B. N. 8, 138.] So too of doors, windows, rings, &c. The same law of keys, though they are distinct things, they shall pass with the house."

A chattel placed by its owner upon the freehold of another, but severable from it, as a door which may be lifted from its hinges, or a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold. It is matter of evidence whether by agreement it does not remain the property of the original owner, Wood v. Hewitt, 8 Q. B. 913; [and the ordinary presumption may be rebutted by circumstances showing the real intention of the act, Lancaster v. Eve, 5 C. B. N. S. 717.]

Such too are heirlooms; see 11 Vin. Abr. 167; Lord Petre v. Heneage, 12 Mod. 520; 1 L. Raym. 728; Pusey v. Pusey, 1 Vern. 273; charters, and evidences attendant on the inheritance (see Lord v. Wardle, 3 Bing. N. C. 680), and the deer and fish in a man's park or fish-pond. See Liford's Case, ubi supra, Shep. Touch. 470.

Yet in these cases of constructive annexation, the articles constructively annexed do not acquire all the incidents of realty; for instance, trover may

be brought for them like other chattels. Yet r is laid down by Lord Cohe that wif a man be seised of a house, and possessed of divers being a strong by custom have gone with the house, and by his will devise to away the holf looms, this devise is void. To, Litt 185 b, see Woods and Lowesti, Compig. Bicas. II.; Hargrave's note, Co. Litt. 18 b; 1 P. Wins 7.00, for the custom vests the property in the hoir instantly on the testator's death, who was the will has no effect till the first moment afterwards.

This seems the proper place for mentioning that, in calculating the rate-able value of property, machinery attached to it ought to be treen into account without considering whether it be real or personal estate so as to be liable to a distress or a fl. fa., or whether it would belong to the landlord or tenant, heir or executor, R. v. Guest, 7 A. & E. 951 | Reg. v. Inhabitate of Lea, L. R. 1 Q. B. 241, Laing v. Enshapeverramouth, 3 Q. B. D. 201, and 7 me Boiler Works Co. v. Ocers ers of L. a g. Bentson, 18 Q. B. D. 81, where the tastementioned case was followed, and Challey v. West Ham, 32 L. T. 486, was explained upon the facts [See, however, Enhance v. L. 100, 7 M. & W. 48, where the value of steam power communicated from an advanced value, under st. 4 G. 2, cap. 28.

Setting these cases of constructive annexation, which are comparatively unimportant, and on which few practical questions arise, completely out of view; the general rule is, that, to constitute an article a fixture, i.e., part of the realty, it must be actually annexed thereto; and a constructive with vertise so annexed becomes part of the realty, and the person who was the owner of it, when a chattel, loses his property in it, which immediately vests in the owner of the soil. Quicquid plantatur solo solo cedit. See Co. Litt. 53 a; Dearden v. Evans, 5 M. & W. 11; and the judgment of Parke, B., in Minshall v. Lloyd, 2 M. & W. 450. This is the general rule, but there are cases in which things annexed to the freehold may be disannexed and carried away by some person claiming a property in them as against the owner of the freehold. It is as a leading authority on questions of this sort that the case reported in the text is chiefly celebrated.

Lord Ellenborough, as will have been seen, divides these questions into three classes.

- 1. Between heir and executor.
- 2. Between executor and remainderman, or reversioner.
- 3. Between landlord and tenant.

We will consider these, and one or two others not noticed in the text, beginning with the most extensive class, riz., that of questions arising between landlord and tenant.

1. The general rule governing this subject is, that the tenant, if he have affixed anything to the freehold during his term, cannot again remove it without the consent of his landlord. See Co. Litt. 53 a, and the judgment of Kindersley, V.-C., in Gibson v. The Hammersmith Railway Co., 32 L. J. Chan. 337]. But, inasmuch as a tenant for years was not punishable for waste, before the statute of Gloucester, neither the rule nor its exceptions could have been of much consequence previous to that period. After the passing of that Act, questions between landlord and tenant occasionally arose in actions of waste, and an opinion was soon expressed by the court, that a lessee engaged in trade and who had set up fixtures for the purpose of carrying that trade on advantageously, had, in some cases, a right to remove them at the expiration of his term.

This seems to have been mooted in Year-book. 42 E. 3, fo. 6, pl. 19; but is first expressly laid down in 20 H. 7. fo. 13. pl. 24, as follows: "Si le lessee pur ans fait ascun furneis pur son avantage, ou dier fait des fats et vaissels pur occupier son occupation, durant le terme il peut remuer eux. Mes s'il soufiert eux etre fixes al terre apres le fin del terme, donq ils appent al lessor. Et sic d'un baker. Et n'est ascun Waste ne remuer tiels choses deins le terme." In this case not only was the exception in favour of traders' fixtures pointed out, but also, as will have been seen, the limitation in point of time which still prevails, and which obliges a tenant who has a right to remove fixtures, to do so during his term. Mr. Amos, in his valuable work, contends with much ingenuity, that this case establishes an exception in favour of other fixtures set up by lessees for years, besides trading fixtures, and he argues that the words si le lessee a fait ascun furneis pur son avantage, must be taken to mean, if the lessee have set up any furnace for his pleasure: and he cites a book entitled " Un abridgement de touts les ans du Roy Henri le Sept," where the words "pur son plesure" are substituted for "pur son avantage." But this abridgment is scarcely to be relied on, for it omits the subsequent words pur occupier son occupation, which are very important to the question mooted by Mr. Amos. There certainly appears to be some improbability in the idea of the lessee having put up a furnace in his house for pleasure. Besides, Co. Litt. 53 a. is express that, in ordinary cases a furnace could not be removed; and, if it were removable in all cases, why should the words pur son avantage have been added at all.

This is, however, merely matter of curiosity, for the law respecting the tenant's right to remove fixtures was not long allowed to depend upon decisions in the Year-books, and his privilege of removing trade fixtures was firmly established by Poole's Case, 1 Salk. 368. Mich. 2 Annæ; where it is laid down by Lord Holt, among other things, "that during the term a soapboiler might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade, and to encourage industry. But, after the term, they become a gift in law to him in the reversion, and are not removable." This case was followed by many others, asserting the same exception, and grounding it on the same reason, namely, the encouragement afforded to trade by public policy. See Lawton v. Lawton, 3 Atk. 13. Lawton v. Salmon, 1 H. Bl. 259 n, recognised in Earl of Mansfield v. Blackburn, 6 Bing. N. C. 426: Penton v. Robart, 2 East, 90; Dean v. Allalley, 3 Esp. 11; Trappes v. Harter, 4 Tyrwh. 121; and the text. In Petrie v. Dawson, 2 Car. & Kir. 138. Cresswell, J., held that a reversionary interest in trade fixtures would pass by a parol agreement.

The benefit of this exception was held, in Lawton v. Lawton, to apply to a fire-engine erected under a shed, and which could not be removed without considerable injury to the freehold: in Dean v. Allalley, 3 Esp. 11, to a shed set up for trading purposes, called a Dutch barn, having a foundation of brick-work and uprights fixed in and rising from the brick-work and supporting the roof which was composed of tiles and sides open: in Fitzherlant v. Shaw, 1 H. Bl. 528, to a shed built on brick-work, and to posts and rails. From Penton v. Robart, 2 East, 88; 4 Esp. 33, as explained by Mr. Amos, little more can be certainly collected than that Lord Kenyon at N. P., and the court afterwards, thought that the mere erection of a chimney would not prevent the right which would have otherwise existed of removing the surrounding building. In Thresher v. E. L. Waterworks Company, 2 B. & C.

608, the question was discussed, whether the tenant could remove a limekiln substantially built of brick and mortar at the cost of 1607 and having its foundations let into the ground. The case, however, turned upon other points.

It sometimes happens that the tenant's right does not depend altigether on the general law, but is extended by a special custom or h_{i} for in Calling v. Infinell, B. N. P. 34, per Treby, C. J.; Lawton v. Suface. 3 Atk. 45 n, per Lord Mansfield; Wetherell v. Howells, 1 Camp. 227; Lewes v. Jones, 2 B. & A. 165; Trappes v. Harier, 4 Tyrwh. 603.

To whatever extent the right to remove trade fixtures may be carried, common sense and justice seem to require that it should be bounded by the rule laid down by Lord Hardwicke in Landon v. Landon, vi., that the principal thing "shall not be destroyed by the accessory." It may perhaps be deduced from this, that, if a trading fixture could not be removed without the destruction or great and serious injury of some important building, it would be irremovable. But when the building is but an accessory to the fixture, such as an engine-house, and built to cover it, there we have the authority of the text for saying that one as well as the other is removable.

Where a lease contained a covenant to repair, and yield up in repair, the furnaces, fire-engines, iron-works, dwelling-houses, and all other erections, buildings, improvements, and alterations, to be thereafter creeted, built, or set up, except the iron-work castings, railways, wimseys, gins, machines, and the moveable implements and materials used in or about the said Turnaces. fire-engine, iron-works, stove-pits and premises; and there was a power given to the lessor to purchase those articles, giving a certain notice, it was held the lessee had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of a building or support of building, although mode of iron; and that in such removal he might disturb such brickwork as was necessary, and was not bound to restore it to a perfect state, as if the article it was intended to support or cover was still there; Foley v. Addenbrooke, 13 M. & W. 174, to which case the reader is referred for the description of a great number of articles to which the above rule was held applicable. [Where a lease contained a provision by which the tenant renounced the ordinary right to remove tenant's fixtures during the term it was held that they could not be taken by the sheriff in an execution against him. Dumerque v. Rumsey, 2 H. & C. 777.

The principal case shows that the tenant's privilege with respect to fixtures set up for trading purposes, does not at common law, extend to those set up for agricultural ones. Some very sensible observations on this point are to be found in the work of Mr. Amos, who argues with great force that the opinion expressed by Lord Ellenborough in the text, cir, that the doctrine sought to be established by the defendant "was contrary to the uniform current of legal authorities," can hardly be maintained; and that the rule laid down by his lordship is liable to this further objection, that it has a tendency to confine the privilege of the tenant within narrower limits than are designated by the policy to which it owes its existence; and there seems no good reason for conferring it on trade to the exclusion of husbandry, a pursuit equally advantageous to the community, and which is now, like manufactures, often carried on by the aid of valuable machinery. Even if the privilege be confined to trade, still many of the occupations of the agriculturist are trades, using that word in its extended sense, not in the narrow and technical one which it expresses in the Bankrupt Act.

The opinion that trade ought, with reference to the subject now under discussion, to bear this more extended sense, is countenanced by Lawton v. Lawton, 3 Atk. 13: Dudley v. Warde, Amb. 113, in which Lord Hardwicke appears to have considered the privilege in question as belonging to fixtures by means of which the owner carried on a species of trade by which he rendered the produce of his own land available to his own profit.

Of a somewhat similar description are the cases of nurserymen and gardeners, who may remove trees, shrubs, and other produce of their ground, planted by them with a view to sale (see Penton v. Robart, 2 East, 91; 7 Taunt. 191; 4 Taunt. 316; see also Wansborough v. Maton, 4 A. & E. 884; R. v. Otley, 1 B. & Ad. 161), which ordinary tenants cannot do, Empson v. Soden, 4 B. & Ad. 656; 1 N. & M. 720. In Penton v. Robart, this privilege was considered to extend to greenhouses and other similar erections. "Shall it be said," asked Lord Kenyon, C. J., "that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated." 2 East, 90. Lord Ellenborough, however, in the principal case, disapproved, as will have been seen, of such an extension. See, too, Buckland v. Butterfield, 2 B. & B. 58, per Dallas, C. J.

Upon the whole, the extent of the tenant's right with respect to agricultural fixtures, does not seem, even as yet, quite defined. It is clear that it does not go beyond, and, unless the opinion expressed by Lord Ellenborough in the principal case be modified, it falls considerably short of his rights with respect to trading fixtures. A modern statute, however, has extended the right to remove agricultural and trading fixtures. By the 14 & 15 Vic. c. 25, s. 3, it is provided that if any tenant of a farm or land shall after the passing of that Act (24 July, 1851), with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), all such buildings, &c., shall be the property of such tenant, and removable by him, notwithstanding the same may consist of separate buildings, or the same or any part thereof may be built in or permanently affixed to the soil; so as the tenant making any such removal do not in any wise injure the land or buildings belonging to the landlord, or otherwise do put the same in like or as good plight and condition as the same were in before the erection of the things so removed. Before removal, however, every tenant must give to the landlord, or his agent, a month's notice in writing of his intention, and the landlord may thereupon elect to purchase the things so proposed to be removed, whereupon the right to remove shall cease: the value is to be ascertained by two referees (one chosen by each party) or their umpire, and is to be paid or allowed in account by the landlord. [And by the 46 & 47 Vic. c. 61, which repeals the Agricultural Holdings Act of 1875, and applies only to holdings wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to a tenant during

his continuance in any office, appointment, or employment, held under the landlord, it is further enacted by $\mathbf{s},\,34$:

"Where after the commencement of this Act a tenant afflices to his bollonic any engine, machinery, bearing, or other fixture or creeks as foulth for which he is not under this Act or otherwise entitled to compensation and which is not so affixed or exceled in pursuance of some oldly of on in that behalf, or instead of some fixture belonging to the building, then such fixture or building shall be the property of and be removable by the tenant of a within a reasonable time after the termination of the benus. Provided as follows:—

- Before the removal of any fixture or butlings the bound shall pay all rent owing by him and shall perform or satisfy all other his obligations to the landlord in respect of the holding.
- In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding.
- Immediately after the removal of any fixture or building, the tenant shall make good all damage occasioned to any other boilding or other part of the holding by the removal.
- The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.
- 5. At any time before the expiration of the notice of removal the landlord by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

The above section differs from the corresponding section (53) of the former enactment only by the addition of the words in italies, and by the omission of the provisions as to steam-engines.]

With respect to fixtures put up for purposes of ere there' or concenience, Lord Holt had, in Poole's Case, 1 Salk. 368, expressly denied the right of the tenant to remove them; and a similar doctrine had been laid down long before in Herlakenden's Case, 4 Co. 64, though denied in Speece v. Meser, 2 Freem, 249. But whether the opinion of Lord Holt expressed in Poole's Case, was or was not warranted by the old authorities, it is now settled that there are many ornamental fixtures which the tenant is entitled to remove. Such are hangings and looking-glasses, per current, in Book v. Rebow, 1 P. Wms. 94; tapestry and iron backs to chimneys, for the executor is entitled to these as against the heir, Horrey v. Horrey, Str. 1141, and the tenant's privileges against the landlord are more extensive; (see, too, per Gibbs, C. J., in Lee v. Risdon, 7 Taunt. 191): wainscot fixed by screws, and marble chimney-pieces, per Lord Hardwicke in Lawton v. Lawton, 3 Atk. 15, and Frp. Quia ca. 1 Atk 477, and per Lord Mansfield, 1 H. Bl. 260, in notis; stoves and grates fixed into the chimneys with brick-work, and cupboards supported by holdfasts, per Bayley, J., R. v. St. Dunstan, 4 B. & C. 686; and see Lee v. Risdon, 7 Taunt. 191; see further, Colegran v. Dits Saptos, 1 B. & C. 77; Winn v. Ingleby, 5 B. & A. 625; R. v. Londonthorpe, 6 T. R. 379.

In Grymes v. Boweren, 6 Bing, 437, the tenant was permitted to remove a

pump which was attached to a stout perpendicular plank resting on the ground at one end, at the other fastened to the wall by an iron pin which had a head at one end, and a screw at the other, and went completely through the wall: "The article," said Tindal, C. J., "was one of domestic convenience. was slightly fixed, erected by the tenant, and might be removed entire." But in Buckland v. Butterfield, 2 B. & B. 54: 4 J. B. M. 440, the court refused to extend the privilege of ornamental fixtures to a conservatory erected on a brick foundation fifteen inches deep, attached to the wall of the dwellinghouse by cantilivers let nine inches into the wall, connected with the parlourchimney by a flue, and having two windows in common with the dwellinghouse, and to a pinery erected in the garden on a brick wall four feet high, The court said that it was "clear on the one hand that many things of an ornamental nature may be in a degree affixed, and yet during the term may be removed; and, on the other hand, equally clear that there may be that sort of fixing or annexation which, though the thing annexed may have been merely for ornament, will yet make the removal of it waste; that every case of this sort must depend upon its peculiar circumstances; and that no case had extended the privilege so far as to include the case then under consideration." See West v. Blakeway, 2 M. & Gr. 729, [and Wilde v. Waters, 16 C. B. 637, in which case it was held that trover would not lie for a ladder, a crane, and a bench, which had been left upon the premises by an outgoing tenant, and had been fastened to the floor, joists, and walls with nails and screws in the usual way].

Mr. Amos remarks that *Buckland* v. *Butterfield* may be considered as the leading case upon the subject of ornamental fixtures.

Whether wainscot fixed without screws can be removed, may, perhaps, be questionable. Lord Hardwicke thought it could, but said it was a very strong case, and many of the older authorities are the other way.

See the subject discussed, Amos, [3rd ed., 125-6], where four circumstances are pointed out as mainly essential to be regarded wherever the question is whether a fixture of an ornamental nature be removable. 1. The mode in which and the extent to which it is united with the premises. 2. Its nature and construction; as whether it appear to have been intended as a temporary or as a permanent improvement. 3. Whether its removal is likely to occasion any, or any considerable, damage to the freehold. Lastly, whether there is any custom or prevalent usage applicable to the case in question.

[In Bishop v. Elliott, 10 Exch. 496, S. C. in error, 11 Exch. 113, where a question arose as to the construction of a covenant to deliver up premises, with all fixtures and articles in the nature of fixtures belonging thereto, some important observations were made in the judgment of the Exchequer Chamber with reference to the principle upon which the right of a tenant to remove ornamental fixtures depends. After referring to the conflicting opinions of Lord Holt and Lord Hardwicke, which are mentioned above, and to the judgment of Lord Mansfield in Lawton v. Salmon; 1 H. Bl. 260, the court proceeded as follows: -- "It does not appear to us at all difficult to reconcile the difference which may appear in these authorities, nor to extract the principle which is to be gathered from them. Considering that the law has been regularly and gradually relaxing its rule as to the removability by tenants of fixtures erected by them, the difference between Lord Holt and Lord Hardwicke is explained by the difference of time. Lord Holt was speaking of the rule unrelaxed; and when Lord Hardwicke spoke of chimney-pieces being removable generally, without any qualification as to their

material or ornamentation, it cannot be supposed that he intended to lay down the rule more broadly than he did in a later case . Limitary Landon, 3 Atk. 13), when he spoke in more qualified terms of marble channey-pieces or than Lord Mansfield, when he used the same qualified terms still later in Lawton v. Salmon, 1 H. Bl. 260 . Nor, on the other hand, would it be reasonable to suppose that the latter intended to limit it to marble chimneypieces, merely as such, with reference to the expense and artistic skill employed upon them. Both, no doubt, had in their minds the same principle which the later cases expressly bring forward, that of their being ornamental In all these cases, no doubt, the same principle was intended to be laid down, which is more formally and precisely stated by Dallas, C. J. (in Buckland v. Butterfield, 2 B. & B. 54). It is a matter of common knowledge, that a century ago, marble chimney-pieces of ordinary grain and plain workmanship were by no means so commonly used in middle-rate houses as now; while chimney-pieces of foreign marbles and workmanship highly sculptured, and of much expense, were objects much esteemed, and often erected in houses of a higher description. Where these had been substituted by the tenant for a chimney-piece of wood or stone, it was but a reasonable relaxation of the strict rule of law to allow their removal during the term. Of chimney-pieces such as these, it seems to us that Lord Hardwicke and Lord Mansfield intended to speak. And when Lord Ellenborough goes more into detail, by his classing them under matters of ornament, and with pier-glasses, hangings, and wainscot fixed only by screws, and the like," he marks distinctly both the principle and the limit of the relaxation. Indeed, it would be very unreasonable to hold that a chimney-piece of the plainest workmanship and most moderate expense, however affixed, might be removed merely because it was of polished limestone, and therefore denominated marble, but that one of granite or freestone, however wrought, and at whatever expense, or of wood, however skilfully carved, might not." See also Sumner v. Bromilow, 34 L. J. Q. B. 130: and as to the construction of contracts limiting the removal of fixtures and articles of a similar kind, Dumergue v. Rumsey, 2 H. & C. 777; and The Duke of Beaufort v. Bates, 31 L. J. Chan. 481.]

It has been already observed, that in the very first case which established the tenant's right to remove fixtures under any circumstances, a limitation to the time during which that right endures, was pointed out. That limitation still exists, and was asserted in one of the later cases on the subject, Lyde v. Russell, 1 B. & Ad. 394. The rule is, in the Year-book, 20 H. 7, laid down, as will be recollected, in the following words: "During his term he may remove them, but if he suffer them to remain fixed after the term, they belong to the lessor:" and the same rule with respect to time is laid down in Poole's and several other cases; Ex parte Quincey, 1 Atk. 477; Dudley v. Warde, Ambl. 113; Lee v. Ridson. 7 Taunt. 191: Buckland v. Butterfield, whi supra; Colegrave v. Dias Santos, 2 B. & C. 79; Lyde v. Russell, whi supra; Weeton v. Woodcock, 7 M. & W. 14: Rogley v. Henderson. 17 Q. B. 574: [Pugh v. Arton, L. R. 8 Eq. 626] and the principal case.

In Penton v. Robart, 2 East, 88, this rule was somewhat enlarged, for, in that case, it was decided that a tenant who had remained in possession after the expiration of his term had a right to take away fixtures which he might have removed during his term. "He was, in fact," said Lord Kenyon, "still in possession of the premises at the time when the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them."

These words, perhaps, cast some slight on the principle which governs this subject. It will be remembered that the words of Lord Holt in Poole's Case, are, " After the term they became a gift in law to him in the reversion, and are not removable." It would seem, therefore, that the landlord's right to them depends upon a presumption of law that the tenant, quitting the premises at the expiration of the term, and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become a gift in law; and this, like some other legal presumptions, is perhaps not capable of being rebutted; but Penton v. Robart may be thought to show that the presumption of gift arises, not immediately on the expiration of the term, but on the tenant's quitting the premises, leaving the fixtures behind him. It must, however, be admitted, that in the report of the same case at Nisi Prius, 4 Esp. 33, Lord Kenyon says, "Where a tenant has by law a right to carry away any erections or other things on the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises for the purpose of taking them away." This doctrine seems, however, to assume that a tenant who has quitted the premises may still retain a right to the possession of the fixtures, which is the very point in dispute. Mr. Amos observes, that the true ground on which Penton v. Robart was decided, may have been that the things carried away were mere chattels, but the facts stated in the report do not appear to warrant such an explanation.

The extension of the tenant's right allowed in *Penton v. Robart*, is qualified by the expressions of the court in *Weeton v. Woodcock.* "The rule," says Alderson, B., in delivering the judgment of the court in that case, "to be collected from the several cases decided on this subject seems to be this: that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant."

[In Leader v. Homewood, 5 C. B. N. S. 546, a tenant remained upon the demised premises for some days after the expiration of his term. He then left the premises, and a new tenant was let into possession, after which the outgoing tenant attempted to re-enter, to remove some fixtures. The court was of opinion that he had no right to do so. "It is perhaps not easy," said Mr. J. Willes, in delivering the judgment of the court, "to understand fully what is the exact meaning of the rule laid down in Weeton v. Woodcock, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures. . . . It is unnecessary to consider the import of the rule with reference to the right of a tenant at sufferance during the continuance of such tenancy; because the landlord, in the present case, had re-entered, and thereby put an end to the tenancy before the outgoing tenant attempted to enforce his right."]

It has been observed that the presumption which arises on a tenant's abandoning the possession is, *perhaps*, not capable of being rebutted. Still it has never been determined what might be the effect of a formal declaration on quitting, that he did not intend to give them to his landlord; see *Davis* v. *Jones*, 2 B. & A. 166. It would, however, probably be held inoperative on the principles explained by the L. C. J. of the C. P., in *Marston* v. *Rowe*, 8 A. & E. 59.

Neither has it ever been decided upon solemn argument whether a tenant whose interest is uncertain in point of duration may to be a some period after the expiration of his tenancy allowed him for the removal of 10 five tures; and, indeed, the case of emblements and one or two other and gles afford reason for believing that such a distinction would be established in his favour. It has never been determined upon solemn as given to but the point might have been involved in the case of Wanssoniah's Matin, I V & E. 884. There, a tenant for lives whose interest had expired and who had quitted the premises, recovered in trover a weeden barn which rested by its own weight on a stone foundation. This case is however, well, open to the observation which has though, perhaps, groundlessly the in nonle on I and a v. Robart, viz., that the barn was not a fixture, but a mere chattel, and the decision appears to have proceeded on that ground alone.

Supposing a tenan, whose interest is of uncertain direction to have a right to remove fixtures after it has expired, it is clear from Weeton v. Woodcock, 7 M. & W. 14, that such right must be exercised within a reasonable time; see the facts of that case, past Sum of v. I'm May real Lecturouth, 4 C. B. N. S. 120, and Moss v. James, S. L. T. N. S. 200. Where, by the terms of the demise, the tenant is entitled to remove tenant's fixtures, and the landlord gives notice of his intention to recenter for a forfeiture, the tenant has a reasonable time from the receipt of the notice for their removal, Sumner v. Browillow, 34 L. J. Q. B. 130).

But whatever may be the precise limitation where the parties are silent, it is clear that they have a right to fix one for themselves by special agreement; see Naylor v. Collinge. I Taunt. 19: Program Brown. 2 Stark. 1955: Thursher v. East London Waterworks Co., 2 B. & C. 608: I what Wansfield v. Blackborn. 6 Bing. N. C. 426; West v. Blakeway, 2 M. & Gr. 755; Foley v. Addenbrooke, 13 M. & W. 174; Weed v. Henrit. 8 Q. B. 915. And it may be questionable whether such a stipulation might not be created by implication from the custom of a particular district; see Wigglesworth v. Dallison, ante, vol. 1, et notas.

In Fairburn v. Eastwood, 6 M. & W. 679, the lease contained a covenant that the fixtures should be valued to the landlord at the end of the tenancy. The tenant having become bankrupt, and the landlord to whom the premises had been delivered up having refused to pay the amount of the valuation to the assignees, it was held that they might maintain trover against him for the fixtures. This case appears to have proceeded on the principle, that, as the landlord by the terms of the covenant was entitled to the possession of the fixtures on condition of his paying for them, it would have been inconsistent with that stipulation to hold that he could retain them after breaking that condition. The case is, therefore, one in which the ordinary rule was qualified by express agreement. See as to the effect of a covenant to leave erections and improvements, West v. Blakeway, 2 M. & Gr. 729; Bishop v. Elliott, [10 Exch. 496, S. C. in error, 11 Exch. 113; and Burt v. Haslett, 18 C. B. 162; S. C. in error, ib. 893. Where an underlessee covenanted to deliver up all landlord's fixtures at the end of the term, it was held that there was no implied covenant or representation by his lessors that he should be at liberty to remove trade fixtures during the term, or that the lessors had not entered into any covenant inconsistent with such right. Porter v. Drew, 5 C. P. D. 143; 49 L. J. C. P. 482.7

It must further be remarked that, unless *Penton* v. *Robart* be considered as overruling *Fitzherbert* v. *Shaw*, 1 H. Bl. 258, it must be taken with the impor-

tant qualification established by that case, viz, that where the tenant's continuance in possession is under a new lease or agreement, his right to carry away the fixtures is determined, and he is in the same situation as if the land-lord, being seised of the land together with the fixtures, had demised both to him. See *Fitzherbert* v. *Shaw*, recognised in *Heap* v. *Barton*, 12 C. B. 274.

The last case which will be cited upon this part of the subject is Lyde v. Russell, 1 B. & Ad. 394. It was an action of trover for bells, pulls, cranks, wires, &c., hung by a yearly tenant at his own expense. After the tenant had quitted, the landlord took down the bells, and refused to deliver them to the tenant, unless he would pay 61. which he claimed for rent. The tenant was held not entitled to recover. This case, with which, although the judgment is not long, Lord Tenterden is said to have taken great pains, goes a step further than any prior decision, for it shows that on the tenant's quitting the land the property of fixtures vests so completely in the landlord, that even though they are subsequently severed and made chattels, the tenant's right to them does not revive. It seems to have been admitted that the bells were fixtures for domestic convenience, which the tenant might have removed during his term.

[It must be observed that all the cases mentioned above, in which the ancient rule of law with reference to the articles affixed to the freehold, has been relaxed in favour of trade, are cases in which the relation of landlord and tenant existed. The same principles are not applicable where the owner of the chattel affixed is also the owner of the fee. See the judgment of Wood, V.-C., in Mather v. Fraser, 2 Kay & J. 536; Walmsley v. Milne, 7 C. B. N. S. 115, and post, p. 223.

A bequest by the owner of a leasehold house of the household furniture therein, will not, except under special circumstances, carry fixtures. *Finney* v. *Grice*, 10 Ch. D. 13; 48 L. J. Ch. 247.

2. The next class of cases consists of those in which the question is between the personal representatives of tenants for life or in tail, and the remainderman or reversioner. The indulgence extended to the executors and administrators of these persons is not so great as that granted in the case of landlord and tenant, and, therefore, though it may be safely assumed that any fixture removable as between the particular tenant's representative and the remainderman would be so as between landlord and tenant, yet the converse is by no means true, the privileges in the latter case being more extensive; and therefore it is that the cases of Lawton v. Lawton, 3 Atk. 13, and Dudley v. Warde, Amb. 113, which really belong to the class which we are now considering, have been cited as authorities applicable to the former class.

Those cases, coupled with the observations of Lord Mansfield in Lawton v. Salmon, 1 H. Bl. 260, and of the L. C. J. in the principal case, show that the representative of the particular tenant is entitled, as against the remainderman, to fixtures erected wholly or in part for the furtherance of trade, and, as the remainderman is less favoured by law than the heir, any decision in favour of the executor of the ancestor against the heir would à fortiori be applicable to a case arising between the executor and the remainderman. Now there are some cases in which the executor has been permitted to remove even ornamental fixtures as against the heir, Harvey v. Harvey, Str. 1141; Squier v. Mayer, 2 Freem. 249; see, too, Beck v. Rebow, 1 P. Wms. 94. But these cases do not go far, for the articles given up to the executor in them seem to have been very slightly annexed to the freehold, and rather

challeds than fixtures properly so called ; and see D[E] meant y -terms. I. R. 3 Eq. 382.

There is one case in which the question arises, not processly between the executor of tenant for life and the remainderman, but between the executor of a parson or other ecclesiastical corporation sole and his successor. In such a case, as the chattels of a corporation sole pass to the executor, he is entitled to certain matters of ornament, such, for instance, as hangings. See Burn. Eccl. L. 301; Gibs 752. The ornaments of a bishop's chain i indeed are the subjects of a peculiar rule; they are in the nature of heiribe its and pass to the successor. Corren's Case, 12 to 106; see Horizon's Krayht, 14 Q. B. 240.

3. As between Heir and Executor. — This is the class in which the polytlege of removal is most limited, the heir being the greater favourite of the law than the remainderman. The rule as laid down in Shepherd's Touchstone, 469, 470, is, that the executor shall not have "the incidents of a house, as glass, doors, wainseet, and the like, no more than the house itself, nor pules, walls, stalks, tables dormant, furnaces of lead and brass, vats in a braw and dye-house, standing and fastened to the walls, or standing in and fastened to the ground in the middle of the house, though fustened to no wall, a support or lead fixed to the house, the doors within and without that are hanging to or serving any part of the house. . . But if the glass be from the windows, or there be wainseet loose, or doors more than are used that are not hanging, and the like, these things shall go to the executor or administrator," and this will be found consonant with the other ancient authorities. See Wentw. Exers. 62; Com. Dig. Brass. B.; & Bac. Abr. 65, 11 Vin. Abr. 166

But modern authorities seem to have somewhat relaxed the strictness of this rule, so far as fixtures partly or wholly essential to trade are concerned. Thus, in a case before C. B. Comyns, and mentioned in Learner v. Learner 3. Atk. 14, the executor recovered from the heir a cider-mill, let into the ground and affixed to the freehold; and Mr. J. Buller considers the cider-mill as on a footing in this respect with other trading fixtures of the same sort, as "brewing-vessels, coppers, and fire-engines." B. N. P. 34.

Yet in Lawton v. Salmon, 1 H. Bl. 260 n.; 3 Atk. 15 n.; Lord Mansfield refused to extend the privilege to salt-pans, though the freehold would not have been injured by their removal, saying, that the inheritance, as had been proved, could not be enjoyed without them; and he spoke doubtingly of the authority of the case of the cider-mill. See, too, the expressions of Lord Hardwicke, in Dudley v. Warde, and in Ex. p. Quincey, 3 Atk. 477; and B. N. P. 34, where the existence of any privilege as against the heir in respect of trading fixtures, seems to be denied. See, too, Lord Ellenborough's expressions in the principal case; Fisher v. Dixon, 12 Cl. and Fin. 312, Dom. Proc., a Scotch case, but decided upon the principles of English law, where it was held that colliery machinery, erected on the lands for their better enjoyment by the absolute owner, passed to the heir, whether obtaining the heritage by descent or purchase, as part of the realty, although portions thereof were capable of being detached without injury to the freehold; Bain v. Brand, 1 App. Cas. 762, where the decision was similar in the case of a lease which is heritable in Scotland; and the judgment of Wood, V.-C., in Mather v. Fraser, 2 Kay & J. 536.]

With respect to ornamental fixtures, it has been already stated that the cases of Squier v. Mayer, 2 Freem. 249, and Harvey v. Harvey, 2 Str. 1141, were between heir and executor. In the former, hangings nailed to the waits,

and a furnace fixed to the freehold and purchased with the house, were given to the executor, and the authority of *Herlakenden's Case* to the contrary denied. In the latter, hangings, tapestry, and iron backs to chimneys, were recovered by the executor in trover; it would, however, be difficult to support the case on any ground, except that the articles recovered were looked upon as mere chattels, for *Colegrave v. Dias Santos*, 2 B. & C. 76, is an authority that *fictures* cannot be recovered in an action of trover. See, too, *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184. [Wilde v. Waters, 16 C. B. 637, and the judgment in *Dumerque v. Rumsey*, 2 H. & C. 777.]

In Beck v. Rebow, 1 P. Wms. 94, A. B. had covenanted to convey a house and all things affixed to the freehold thereof: this was held not to include haugings and looking-glasses fixed to the walls with nails and screws, and which were as wainscot, there being no wainscot underneath. A contrary opinion had been expressed the year before in Care v. Cave, 2 Vern. 508; 3 Bac. Abr. 63, with respect to pictures put up instead of wainscot; the Lord Keeper thought that they belonged to the heir, for that the house ought not to come to him mained or disfigured, [and see D'Eyncourt v. Gregory, L. R. 3 Eq. 382]. There is, therefore, some contradiction among the authorities on this subject: and, besides, Herlakenden's Case and Cave v. Cave, dicta will be found in very modern cases which militate against such an extension of the executor's rights as Beck v. Rebow would appear to warrant. See the judgment in the principal case, and in Lawton v. Salmon, 1 H. Bl. 260 n.; Winn v. Ingleby, 5 B. & A. 625; Colegrave v. Dias Santos, 2 B. & C. 76; and R. v. Inhabs. of St. Dunstan, 4 B. & C. 686.

The rule laid down by Mr. Justice Blackstone is, "Whatever is strongly affixed to the freehold, or inheritance, and cannot be severed thence without violence or damage, quod ex adibus non facile revellitur, is become a member of the inheritance, and shall therefore pass to the heir." See also the judgments in Hellawell v. Eastwood, 6 Exch. 295; [Mather v. Fraser, 2 K. & J. 536; and Walmsley v. Milne, 7 C. B. N. S. 115.]

4. There is another class of cases in which questions have arisen as to the right to fixtures; those, viz., arising between vendor and vendee, mortgagor and mortgagee. There appears to be no doubt, that upon the sale of the freehold, fixtures attached to it will pass in the absence of any express provision to the contrary. Per Parke, B., in Hitchman v. Walton, 4 M. & W. 409. See Ryall v. Rolle, 1 Atk. 175; Steward v. Lombe, 1 B. & B. 507; Thresher v. E. London Waterworks Co., 2 B. & C. 609. And in Colegrave v. Dias Santos, 2 B. & C. 76, the court appears to have considered the rule between vendor and vendee to be the same as that between heir and executor. "In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass." Per Bayley, J., ibid. If, however, there be an express term in the agreement relating to the fixtures, that is of course to be abided by. The words "fixtures to be taken at a valuation" are sometimes used; and a learned author is of opinion, that these include such fixtures as would be deemed personal assets between heir and executor. (See Hitchman v. Walton, 4 M. & W. 409.)

Where a house is demised together with the fixtures, the tenant's interest in them is similar to that which he enjoys in respect of trees; and if he sever them, the right of possession immediately revests in the landlord, who may bring trover. Farrant v. Thompson, 5 B. & A. 826. However, the tenant's

interest is sufficient to enable him or his assignee to maintain trover against a wrong-doer who tortiously severs them. *Hitchneim* v. W. et al., 4 M. & W. 409: *Boudell* v. *M'Michael*, 1 C. M. & R. 177.

As to Mortgages, there seems no good reason for saying, that a mortgage of land can be construed to pass any different rights with respect to fixtures than a conveyance. See Hitchman v. Walton, 4 M & W 100; Language v. Meagor, 2 B. & Adol, 167; Trappes v. Herter, 3 Tyrwh, 603; and Wulseste v. Milne, 7 C. B. N. S. 115,] as to the construction of such mortgages). The contrary, indeed, was supposed to have been laid down in Exp. Quincey, 1 Atk, 477; but, as Mr. Amos has shown, without any very sufficient reason. The continuing possession of fixtures by a mortgager, after a mortgage of the land to which they are annexed, cannot be treated as a badge of trand. See Stewart v. Lombe, 1 B. & B. 506; Ryall v. Roch, 1 Atk, 165; Minshall v. Lloyd, 2 M. & W. 450.

[In Waterfall v. Penistone, 6 E. & B. 866 approved by Malins V. C., in Beybie v. Fenwick, L. R. s Ch. 1079 n , it was held that machinery annexed to an estate after a mortgage did not pass to the mortgagee as pared of the freehold, the instrument of mortgage showing that the parties did not so intend. But in a later case in which a mortgagor who was the owner of the inheritance had annexed, after the date of the mortgage, fixtures to the freehold for a permanent purpose, and for the better enjoyment of the estate, it was held by the Court of Common Pleas that these fixtures had become a part of the mortgaged estate, there being no evidence of a contrary intention, and that they could not be claimed by the assignee in bankruptcy of the mortgagor, although they might be trade fixtures, which in the case of an ordinary tenancy would have been removable by the tenant. Walmsley v. Milne, 7 C. B. N. S. 115. And the like rule applies in mortgages of leaseholds, both as to fixtures annexed at the time of and subsequently to the mortgage, and which in the ordinary course the mortgagor, had he not executed the mortgage, would have been entitled to remove, Meux v. Jacobs, L. R. 7 H. L. 481. In Walmsley v. Milne, the court explained and distinguished Trappes v. Harter, and Waterfall v. Penistone, and stated that the decisions which establish that where a tenant for years has put up trade fixtures, he may remove them before his tenancy expires, have no application to cases between mortgagor and mortgagoe, in which the relation of landlord and tenant does not exist. The same rule was recently followed in Cullick v. Swindell, L. R. 3 Eq. 249; and Climic v. Wood, L. R. 3 Ex. 257; 4 Ex. 328; and so as to trade fixtures annexed in a "quasi permanent manner," Longbottom v. Berry, L. R. 5 Q. B. 123, approved in the C. A. in Sheffield, &c., Building Society v. Harrison, 15 Q. B. D. 358, 54 L. J. Q. B. 15. See also Mather v. Fraser, 2 Kay & J. 536; Ex parte Ashbury, in re Richards, L. R. 4 Ch. 630; Holland v. Hodgson, L. R. 7 C. P. 328; Tottenham v. Swansea Zinc Ore Co., 52 L. T. 738. In another modern case a lessee mortgaged tenant's fixtures and afterwards surrendered his lease, and took from his landlord a fresh term; it was held, under these circumstances, that the mortgagee had a right to enter and sever the fixtures, as it was not competent to the tenant to defeat his grant by a subsequent voluntary surrender. The London Loan and Discount Co. v. Drake, 6 C. B. N. S. 798; Saint v. Pilley, L. R. 7 Ex. 137. And although the mortgagor has " for the purpose of better securing the interest," attorned tenant to the mortgagee, the latter is entitled to the trade fixtures against the trustee of the bankrupt mortgagor, though affixed after the execution of the mortgage, Exparte Punnett, 16 Ch. D. 226, 50 L. J.

Ch. 212. But where mortgagor in possession has let the premises after the mortgage, trade fixtures brought on by the tenant may be removed by him as by any other tenant, *Sanders* v. *Davis*, 15 Q. B. D. 218, 54 L. J. Q. B. 576.

The question, what are fixtures? was frequently discussed with reference to the operation of the Bills of Sale Act, 17 & 18 Vict. c. 36 (now repealed by 41 & 42 Vict. c. 31), as to the registration of mortgages embracing fixtures. Boyd v. Shorrock, L. R. 5 Eq. 72; Hawtrey v. Butlin, L. R. 8 Q. B. 290; Ex parte Dalglish, L. R. 8 Ch. 1072; Meux v. Allen, 22 W. R. 609 (decided apparently under a mistake of fact, see Meux v. Jacobs, ubi sup.); and the rule established under the earlier act would seem to have been that the terms of the deed itself must be looked at, in order to determine whether the parties themselves intended to constitute the fixtures a distinct security, in which case only would the deed require registration, Ex parte Barclay, re Joice, L. R. 9 Ch. 576. The test in these cases has been whether there was or was not a power to sever and sell the fixtures; and see Re Eslick, ex parte Alexander, 4 Ch. D. 503; Re Trethowan, Ex parte Tweedy, 5 Ch. D. 559. Questions of this kind are now concluded by the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31. By s. 4 of that statute, fixtures (when separately assigned or charged) are constituted "personal chattels" for the purposes of the act, but fixtures other than trade machinery as therein defined are excepted from the definition, when they are assigned together with a freehold or leasehold interest in any land or building to which they are affixed. In the definition of "trade machinery," s. 5, the fixed motive powers, and the fixed machinery for transmitting the action of the motive powers, and pipes for steam, gas, and water, are excluded, and with these exceptions the machinery used in or attached to any factory or workshop is constituted personal chattels, and any disposition thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the act. By s. 7, "No fixtures or growing crops shall be deemed, under this act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the lands on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

"The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court which shall take place or be issued after the commencement of this act."

Putting aside therefore trade fixtures in the limited sense of the definition. which are for all purposes of the act to be treated as mere personal chattels like furniture, the legislature would seem to have enacted the law as laid down in *Mather v. Fraser*, and *Holland v. Hodgson*, viz., that where an instrument which conveys an interest in land, conveys also fixtures, it does not require registration; and it proceeds to get rid of some of the qualifications engrafted upon this rule by cases such as *Re Eslick*, *supra*, by providing that some of the tests therein referred to are not to be regarded as conclusive proof that the fixtures were intended to constitute a separate and distinct

security; see the sections considered in Exparte Moore, &c., Benking Co., 14 Ch. D. 379. In that case Bacon, V.-C., apparently regarded a trainway as not a trade fixture within the definition, and held that it, as well as a steam crane, cramped on to large stones fixed in a bed of mortar, passed to the mortgagee of the land without registration.]

Questions respecting the right to flatures have also arisen between the assignces of bankrupts and other parties. Generally speaking, the assignces of a bankrupt tenant would be entitled to whatever interest in the fixtures the bankrupt himself possessed. See Trappes v. Harter, 3 Tyrwh 603; but 6 G. 4, cap. 16, sec. 72, [now repealed, but in substance resenacted by the 46 & 47 Vict. c. 52, s. 44,] entitled them to goods and chattels which he had at the time of bankruptcy in his possession, ordering, or disposition, by the consent and permission of the true owner, and of which he was reputed owner; and it has sometimes been contended, that this enactment might have the effect of entitling them to fixtures. The chief decision on this subject is Horn v. Baker, 9 East, 215, which is frequently cited, and so completely falls within the definition of a leading case, that it is printed next to that of Elwes v. Mawe in this collection. In Weeton v. Woodcock, 7 M. & W. 14, a term ceased by proviso on the tenant's bankruptcy, and it was held, that the assignee could not justify the removal of a trade fixture after the expiration of a reasonable time for that purpose. Whether they might have removed it within such reasonable time was not decided.

[In Stansfield v. The Mayor of Portsmouth, 4 C. B. N. S. 129, a lease, which was determinable on the bankruptcy of the lessee, contained a proviso that none of the machinery set up on the premises during the term for the purpose of carrying on a particular trade should be removed, but should, on the determination of the lease, belong to the lessors; but that this stipulation should not apply to machinery set up for any other purpose, which might be removed by the tenant during, or at the expiration of, the term. The tenant became bankrupt, and the lessor re-entered. It was held, that the assignees in bankruptcy of the lessee were entitled to enter upon the premises for the purpose of removing the fixtures other than trade fixtures, and to a reasonable time for that purpose.

After some difference of opinion it was decided that where the trustee of a bankrupt or liquidating tenant disclaimed the lease under s. 23 of the Bankruptcy Act, 1869, he could not remove fixtures either before or after the disclaimer, since by the disclaimer the lease was to be "deemed to have, been surrendered" from the date of the adjudication, and the effect of a surrender was to deprive the tenant of any right to subsequently remove fixtures; Exparte Brook, 10 Ch. D. 100, 48 L. J. Bkcy. 22; (reversing Exparte Foster, 47 L. J. Bkcy. 101); Exparte Glegg, 19 Ch. D. 7, 51 L. J. Ch. 367; but the law has been altered by the Bankruptcy Act, 1883, s. 55, which makes the disclaimer operate from the date thereof, and the court in giving leave to disclaim will direct that the landlord shall either take the fixtures at a valuation, or allow the trustee a reasonable time to remove them, In re Moser, 13 Q. B. D. 738.]

Where the assignees of a bankrupt lessee severed and sold fixtures which had been assigned to the plaintiff, it was held, in an action of trespass against them, that the proper measure of damages was the value of the fixtures annexed to the premises, inasmuch as they might have sold them with the lease of the house, and so have realized that value for them. Thompson v. Pettit, 10 Q. B. 101. [See also as to when fixtures passed to assignees in

bankruptcy, Waterfall v. Penistone, 6 E. & B. 876, and Walmsley v. Milne, 7 C. B. N. S. 115.]

6. As between Heir and Devisee it is held that if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty to which they are incident, Shep. Touchst. 469, 470; 4 Co. 62; unless indeed they be such things as would pass to his executor. [See as to what will pass by such a devise as against the remainderman, D'Eyncourt v. Greyory, L. R. 3 Eq. 382.] On the other hand, the rights of the devisee of lands against the executor of the devisor would seem, on principle, to be the same as those of the heir in whose place the devisee stands.

The term fixtures, in its proper sense, is confined to personal chattels, which, though they have been annexed to the freehold, are removable at the will of the person who annexed them; Chitty on Contracts (11th Am. Ed.) 489. The character of the property, whether personal or real, in respect to fixtures, is governed very much by the intention of the owner, and the purpose to which the erection is to be applied; 2 Kent 13th Ed. 343. Whatever was fixed to the freehold perpeteui usus was deemed a part of the res immobiles of the civil law, Id. 347, and this perpetuity in the use of the chattel, in connection with the freehold, furnishes an important consideration in determining the question as to whether the chattel, in any given case, is, or is not, a failure. Whether the fixture in any given case is removable depends largely upon the relation of the parties to property and to each other.

"It is impossible," says Chief Justice Morton, in the case of Hubbell v. East Cambridge Savings Bank, 132 Mass. 447, "to lay down any precise test by which to determine whether machinery or other articles attached to, or used in a building, become part of the realty. It depends upon the relation of the parties, the character of the articles, their adaptation to, and the manner in which they are annexed to, or used in the building, and generally upon the circumstances of each case as indicating the intention of the parties." See 81 N. Y. 38; 42 Mich. 314; 46 Tex. 551; 40 Mich. 693. In view of this statement of the law, it need surprise no one to find irreconcileable conflict in the many decisions of the numerous courts of this country on this branch of the law of property. The right of a tenant to sever chattels which he has annexed to the realty is not inconsistent with the doctrine that until severed the chattels are a part of the realty. The contrary view has been a source of confusions in decisions upon this subject. In every case the relation of the parties to the property and to each other must be carefully observed. In the numerous cases found in American Reports, controversies respecting fixtures have ansen between vendors and vendees, mortgagors and mortgagoes, landlords and tenants, executors and heirs or devisees, executors and remaindermen or reversioners, mortgagees of the realty and mortgagees of the personalty, and between attaching oredlins or claimants under mechanics' lien laws and others. The ours upon this branch of the law are very numerous, and no attempt has been made to cite them all in this note; but references have been made in sufficient number, it is believed, to show the state of the law in all parts of the country where decisions on this subject have been rendered. Citations, with few exceptions, are limited to decisions of the courts of final resort in each jurisdiction.

The object or purpose of the annexation—its influence in the determination of the question as to whether the chattel has become a fixture. Wall v. Hinds, 4 Gray 256-271; Bliss v. Whitney, 9 Allen 114; Parsons v. Copeland, 38 Me. 538; Capen v. Peckham, 35 Conn. 88; Teaff v. Hewitt, 1 Ohio St. 511; Perkins v. Swawk, 43 Miss. 348; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57; Chapman v. Union Life Insurance Co., 4 Bradw. (Ill.) 29; Taylor v. Collins, 51 Wis. 123; Strickland v. Parker, 54 Me. 266. Whether a chattel, detachable from the realty, without injury, has become an immovable fixture, may depend upon agreement or special relation of the parties; Warner v. Kenning, 25 Minn. 173. An article by severance and the understanding of parties may become a chattel personal, which would otherwise be a fixture; Sampson v. Graham, 96 Pa. St. 405.

The relation of the party to the freehold making the annexation.

— Lapham r. Norton, 71 Me. 83; Towne r. Fiske, 127 Mass.
125; Northern Central R. Co. r. Canton Co., 30 Md. 347;
Hill r. Sewald, 53 Pa. St. 271; Strickland r. Parker, 54 Me.
263; Wall r. Hinds, ubi supra.

A., the owner of a lot of land, entered into a written contract to sell the same to C., with the further agreement that C. was to build a house thereon. A small wooden house was, in pursuance of the agreement, built on the lot and rested on wooden blocks. The builder subsequently, without A.'s consent,

removed the house from the lot. *Held*, that while the house stood upon the lot it was part of the realty and belonged to A., and that after it was moved off it became a personal chattel, but yet remained A.'s property; Central Br. R. Co. v. Fritz, 20 Kan. 430. See 11 Cush. 11; 7 Gray 26.

The adaptability of the chattel annexed to permanent use on the land or in the building to which it is annexed. — The Rahway Sav. Inst. v. The Irving St. Bap. Ch., 36 N. J. Eq. 61; Allen v. Mooney, 130 Mass. 155; Corcoran v. Webster, 50 Wis. 125; Town v. Firth, ubi supra; Ferris v. Quimby, 41 Mich. 202. In Allen v. Mooney, ubi supra, it was held to be a question of fact or mixed question of fact and law whether a portable furnace, set on a brick foundation, with the pipes and registers connected therewith, is so placed in a house upon mortgaged land as to become a part of the realty, — the furnace having been placed in the house by the owner and adapted for use therein.

The manner of annexation, though an important fact to be considered, yet it does not supply a conclusive test by which to determine whether the given article is or is not a removable fixture.— Van Ness v. Pacard, 2 Pet. 137; Holmes v. Tremper, 20 Johns. 29; Dame v. Dame, 38 N. H. 429; Curtiss v. Hoyt, 19 Conn. 165; Barnes v. Barnes, 6 Vt. 388; Smith v. Benson, 1 Hill 176; Kimball v. Grand Lodge of Masons, 131 Mass. 59; Leonard v. Stickney, 131 Mass. 541. In Goddard v. Chase, 7 Mass. 432, it was held that iron stoves fixed to the brick work of the chimneys of the house become a part of the realty and pass with it under a levy of an execution. This case has been doubted, and the facts are too imperfectly reported to make the decision one of much value as an authority. Ferry-boat with chains and buoys held not to be fixtures; Cowart v. Cowart, 3 Lea (Tenn.) 57.

It is rather the permanent and habitual use, and not the manner of annexation, that determines the character of the articles annexed. — Cook v. Champlain Trans. Co., 1 Den. 91; Brennan v. Whitaker, 15 Ohio 446; Walker v. Sherman, 20 Wend. 636; Blethen v. Towle, 40 Me. 310; Ward v. Kilpatrick, 85 N. Y. 413. In this case mirror frames designed by the owner of the building to which they were attached, for permanent use, were held to be a part of the realty. See, also, Harmony Building Association v. Berger, 99 Pa. St. 320. Temporary severance not intended to be permanent does not divest the article of its characteristic as a fixture; Williamson v. New Jersey Southern

R. R. Co., 29 N. J. Eq. 311; Patton v. Moore, 16 W. Va. 428 (see 63 Ga. 490). Engines, cars and rolling stock of a railroad treated as fixtures; McMillen v. Fish, 16 W. Va. 610. So machinery in a woollen factory; Lyle v. Palmer, 42 Mich. 314.

To constitute an article a fixture, it need not necessarily be actually fastened to the freehold.—Alvord Carriage Co. v. Gleason, 36 Conn. 86; Capen v. Peckham, ubi supra; State v. Northern Central R. Co., 18 Md. 193; Minnesota Co. v. St. Paul Co., 2 Wall. 645, note; Farrar v. Stackpole, 6 Greenl. 157; Snedeker v. Warring, 2 Kern. 170; Rowand v. Anderson, 33 Kan. 264; Hackett v. Amsden, 57 Vt. 432; Voorhis v. Freeman, 2 Watts & S. 116; Pyle v. Pennock, Id. 390. This class of cases is sometimes spoken of as cases of constructive annexation; Morris's Appeal, 88 Pa. 368. Rails and bricks do not become fixtures until actually or constructively annexed to the free-hold; Thweat v. Stamps, 67 Ala. 96. Boards used as a permanent floor in a corn barn, and stone posts on a farm to be used for fences are fixtures; Hackett v. Amsden, 57 Vt. 432 & 641; see Rowand v. Anderson, 33 Kan. 264.

As between landlord and tenant the law regards with peculiar favor the right of the tenant to remove articles annexed by him to the freehold during his tenancy. - Wall v. Hinds, 4 Gray 270; Gaffield v. Hapgood, 17 Pick. 34; Miller v. Baker, 1 Met. 27; Winslow v. Merchants' Ins. Co., 4 Met. 306; Pellenz v. Bullerdieck, 13 La. Ann. 274; 18 La. Ann. 614; Finney r. Watkins, 13 Mo. 291. In Ambs v. Hill, 10 Mo. App. 108, the court held a fixture is removable when the premises will be in as good condition after removal as before, and these questions are in all cases for the jury. In Deane v. Hutchinson, 40 N. J. Eq. 83, it was held that a building erected by a tenant on leased land was not removable as a trade fixture, his lease containing no provision for such removal. This seems to be a limitation of the tenant's right of removal, which will not be found in the decisions of courts generally. A building may as well be a trade fixture as a piece of machinery placed within it.

In the case of King v. Johnson, 7 Gray 239, Bigelow, J., states succinctly the general rule of the common law to be, "that things affixed to the realty become part thereof, and belong to the owner of the soil." He also gives "the reason why a tenant is allowed to remove structures erected for purposes of trade or convenience, affixed by him to the realty

during his tenancy; it is because having paid as rent a full equivalent for the use of the premises as demised, it would be inequitable to compel him to forfeit articles at the end of the term, which he had procured for his own use, and at his own expense." But in that case the court decided that a person occupying land under an agreement with the owner to purchase, paying no rent, has not a tenant's right to remove a fixture he has placed on the land. See McLaughlin v. Nash, 14 Allen 136.

The fixtures which a tenant may remove are (1) those put up for ornament or the more convenient use of the demised premises, and (2) trade fixtures; such as cisterns, sinks, and gas pipes; Wall v. Hinds, ubi supra; a padlock for securing a corn-barn and movable boards fitted and used for corn-bins; Whiting v. Brastow, 4 Pick. 310. Trees and shrubs on land demised and used as a nursery garden; Miller v. Baker, 1 Met. 273. Platform scales; Bliss v. Whitney, 9 Allen 114. A wooden ice-house; Antoni v. Belknap, 102 Mass. 193. Bowling alleys with their usual appurtenances; Id. 201. A glass case, case of drawers, a mirror and gas fixtures procured by a tenant for an eating-saloon; Guthrie v. Jones, 108 Mass. 191.

Counter, shafting, pulleys, hangers and belts, a portable furnace, and steam pipes; Holbrook v. Chamberlin, 116 Mass. 155. See Talbot v. Whipple, 14 Allen 177; Kimball v. Grand Lodge of Masons, 131 Mass. 59. A pump placed in a well by a tenant, he may remove; McCracken v. Hall, 7 Ind. 30. A new boiler, back stand, and valve put in a mill; Mason v. Fenn, 13 Ill. 525.

A ball-room erected by the lessee of an inn; Ombury v. Jones, 19 N. J. 234. A still set up on land of the lessor by the lessee; Pillow v. Love, 5 Hayw. (Tenn.) 109. Buildings erected by lessees upon vacant lots under "ground leases" are by a custom in the city of Milwaukee removable as fixtures; Keogh v. Daniell, 12 Wis. 163. Fixtures of a saw-mill; Stokoe v. Upton, 40 Mich. 581. See McAuliffe v. Mann, 37 Mich. 539.

A steam engine, machinery, and fixtures attached to the soil by a lessee, for the purpose of hoisting coal from mines situated thereon, including all boxes and other necessary appliances connected therewith, become fixtures; Dobschuetz v. Holliday, 82 Ill. 371, 376; Ege v. Kille, 84 Pa. St. 333. Mirrors set in the wall of a building by making recesses therein, which recesses would be left rough if the mirrors were removed, will be

considered as part of the freehold; Mackie v. Smith, 5 La. Ann. 717. This case arose under the Code of La. Acts, 459, 460.

The rule as to the right of tenants to remove, a groundly adopted in the courts of this country, is stated by Story, J., in giving the opinion of the court in Van Ness. Parad, 2 Pet. 146: "The question whether removable or matches not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is do a not for purposes of trade or not.

The following cases illustrate various aspects of the rights of landlord and tenants as to fixtures: Miller v. Plumb, 6 Cowon 665; Kittredge v. Woods, 3 N. H. 503; Despatch Line v. Bellamy Mig. Co., 12 N. H. 205; Powell v. Monson Mig. Co., 3 Meson 450; Farrar v. Stackpole, 6 Greenl. 154; Voorlas v. Freeman, 3 Watts & S. 116; Swift v. Thompson, 9 Conn. 63; Robinson v.

Wright, 2 MacArthur 54 (D. C.).

A lessee who accepts a new lease of the demised premises before the expiration of the first term, the new term to commence at the close of the first, loses his right to remove, at the end of the first term, fixtures he had placed on the premises before the execution of the new lease, if there be no reservation in the new lease of his right of removal; Watriss v. National Bank of Cambridge, 124 Mass. 571. But in Kerr v. Kingsbury, 39 Mich. 150, it was held that the tenant's right of removal continued under the new lease. See Marks v. Ryan, 63 Cal. 107. One deriving title to demised premises, while the tenanty exists, under a mortgage given by the lessor subsequent to the lease, has no other or greater rights as against the tenant than the lessor had; Globe Marble Mills v. Quinn, 76 N. Y. 23.

The law of fixtures as between mortgagor and mortgagee. Machinery which may be easily disconnected from the freehold and used in any other building does not pass to the mortgagee of the freehold, absolutely; Gale r. Ward, 14 Mass. 352; Taylor r. Townsend, 8 Mass. 411. Machines adapted for use in any building in which they can be put, secured in position by bolts, &c., and capable of being removed without injury to themselves or to the building, do not necessarily, as matter of law, pass under a mortgage of the building and land on which it stands; Maguire r. Park, 140 Mass. 21; Carpenter r. Walker, Id. 416. A chattel mortgage on machinery in a building was given in

contemplation of the same being annexed to the realty. After it was annexed, a mortgage of the land and building was given. Held, that the second mortgagee could hold the machinery against the first mortgagee; Pierce v. George, 108 Mass. 78. See Adams v. Beadle, 47 Iowa 439. See Ridgeway Stove Co. v. Way, 141 Mass. 557. Machinery so attached to mortgaged premises as to be a part of the freehold as between mortgagor and mortgagee, cannot, by any agreement between the mortgagor and a subsequent lessee, be converted into personalty, so as to affect the rights of the mortgagee; Thompson v. Vinton, 121 Mass. 139. See Robertson v. Corsett, 39 Mich. 777.

A mortgage of a building covers fixtures intended to permanently increase the value of the building for occupation, but not machines incidental merely to the business carried on in the building at the date of the mortgage; McConnell v. Blood, 123 Mass. 47. Whether a portable furnace is so placed in a house as to be covered by a mortgage of the land is a mixed question of law and fact; Allen v. Mooney, 130 Mass. 155.

Iron rails so placed on the road-bed of a railway company as to be part of the realty, yet by agreement between the vendor of the rails and the company they may, when so placed, retain their character as personal property; but such agreement cannot affect the rights of a prior mortgagee of the railroad; Hunt v. Bay State Iron Co., 97 Mass. 279. See 130 Mass. 547; 127 Mass. 542; 132 Mass. 447; Cooper v. Davis, 15 Conn. 556; Burnside v. Twitchell, 43 N. H. 390.

Fixtures placed in a building by the mortgagor, after the execution of the mortgage, become part of the realty and cannot be removed by him as against the mortgagee; Wood v. Whelan, 93 Ill. 153; Winslow v. Merchants' Ins. Co., 4 Met. 306; Cole v. Stewart, 11 Cush. 181; Wight v. Gray, 73 Me. 297; Clore v. Lambert, 78 Ky. 224; Smith Paper Co. v. Servin, 130 Mass. 511; Hamilton v. Huntley, 78 Ind. 521; Jones v. Detroit Chair Co., 38 Mich. 92. See Richardson v. Copeland, 6 Gray 536; Lynde v. Rowe, 12 Allen 100.

Gas chandeliers and pendant gas burners, capable of being detached without injury to the pipe or building, not covered by a mortgage of the realty; Montague v. Dent, 10 Richardson (S. C.) 135; Vaughen v. Haldeman, 33 Pa. St. 522; Chapman v. Union Life Ins. Co., 4 Bradw. (Ill.) 29; Early v. Burtis, 40

N. J. Eq. 501.

A mortgage of an entire line of a railroad, with all the tolls and revenues thereof, covers not only the line of the road, but all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues; State v. Northern Central R. Co., 18 Md. 194. See Arnold r. Crowder, 81 Ill. 56. If a tenant at will of the mortgagor adds fixtures to the mortgaged premises, his right of removal, after the mortgagee has taken possession, is governed by the rule as between mortgagor and mortgagee, and not as between landlord and tenant; Lynde v. Rowe, 12 Allen 100. A planing machine put into a mill after the execution of a mortgage of the latter, and resting by its own weight on the floor and connected with the machinery by a running belt, held to be personal property and not covered by the mortgage of the realty; Wells v. Maples, 15 Hun 90. See Hart r. Sheldon, 34 Hun 38; Booraem r. Wood, 27 N. J. Eq. 371; Zeller v. Adam, 30 N. J. Eq. 421; Watson v. Watson Mfg. Co., Id. 483; Wheeler v. Bedell, 40 Mich. 693. See Ferris v. Quimby, 41 Mich. 202. Cotton machinery, such as spinning-frames and twisting-frames, though fastened to the floor by nails or screws, held to be personal property and covered by a chattel mortgage as against the mortgagee of the realty; Keeler v. Keeler, 31 N. J. Eq. 181; Rochereau v. Bobb, 27 La. Ann. 657; Pope r. Jackson, 65 Me. 162; State Savings Bank v. Kercheval, 65 Mo. 682. A shingle machine not fastened to the floor except by a strip to prevent its slipping, not a fixture; Wells v. Maples, 15 Hum (N. Y.) 90; Sisson v. Hibbard, 75 N. Y. 542; Morris's Appeal, 88 Pa. St. 368. Articles that would otherwise become fixtures may, by agreement of parties in interest, claim the character of personal property; Smith v. Waggoner, 50 Wis. 155. A portable furnace held not to be a fixture as between mortgagor and mortgagee; 36 N. J. Eq. 61, 452; Wolford v. Baxter, 33 Minn. 12. If the owner of mortgaged land places upon it articles so that they become a part of the realty, an agreement between the seller of the articles and the mortgagor, that title to the articles shall remain in the seller till paid for, will not prevent the mortgage from attaching to them; Bass Foundry, &c. v. Gallentine, 29 Ind. 525.

Vendor and vendee. — As between vendor and vendee, stationary machinery placed upon the premises by the vendor, and used by him during his ownership of the freehold, becomes an irremovable fixture; Harkness v. Sears, 26 Ala. 493. The ma-

chinery of a steam-flouring mill is considered part of the realty, as between vendor and vendee, but otherwise between landlord and tenant; McGreary v. Osborne, 9 Cal. 119. Fixtures annexed to the freehold by an occupant, and on an executory contract to purchase it, become a part of the realty; King v. Johnson, 7 Gray 239; Smith v. Moore, 26 Ill. 392, which the person thus annexing the fixtures has not a right to remove; Westgate v. Wixon, 128 Mass. 304. Fixtures that have become part of the realty as between vendor and vendee, pass to the vendee free from the lien of a prior chattel mortgage of which the vendee has no notice; Davis v. Buffum, 51 Me. 160; Bringholff v. Munzenmaier, 20 Iowa 513. Nor can the vendor be permitted to limit the effects of his deed by proof of a parol reservation of the fixtures; Noble v. Bosworth, 19 Pick. 314. Fixtures to a gas pipe do not become a part of the freehold so as to pass by a grant of the latter; Shaw v. Lenke, 1 Daly 487; Heysham v. Dettre, 89 Pa. St. 506. See Leonard v. Stickney, 131 Mass. 541. If the owner of unincumbered real estate sells an article, which as a fixture is a part of the realty, the sale operates as a severance of the fixture and the vendee has a right to remove it as a chattel personal; Folsom v. Moore, 19 Me. 252; Freeland v. Southworth, 24 Wend. 191. See Towne v. Fiske, 127 Mass. 125. This was a case between the vendee of what was claimed as a fixture, and an officer who had attached the article on a writ in favor of a third party; Turner v. Wentworth, 119 Mass. 459. This case arose between a party seeking to enforce a mechanic's lien on certain furnaces and ranges and the owner of the building in which they had been placed. Held, that the question whether the furnaces and ranges were fixtures, and so part of the realty, was one of mixed fact and law, depending upon whether the furnaces, &c., were sold by the petitioner as personal property, or furnished as parts of the house.

A bathing-tub and the necessary pipes conducting water into it, if fastened by nails, pass to the vendee of the house; Cohen v. Kyler, 27 Mo. 122. But gas fixtures, candelabras, chandeliers, &c., do not pass to the vendee as part of the realty; Rogers v. Crow, 40 Mo. 91; Fratt v. Whittier, 58 Cal. 126; Terhune v. Elberson, 3 N. J. L. 726; Cross v. Marston, 17 Vt. 533. A banker's safe, though bricked up does not pass by a deed of the realty; 50 Texas 65. Window blinds and double windows pass by deed of the house; Peck v. Batchelder, 40 Vt. 233. A sale of

the land held to pass the crops growing thereon; Planters' Bank v. Walker, 3 S. & M. 409; centra in Pennsylvania, Smith v. Johnson, 1 P. & W. 471; Keisel v. Earnest, 21 Pa. St. 90. See Plakens v. Reed, 1 Swan (Tenn.) 80. Manute mole in the course of husbandry upon a farm is part of the freehold; Stane v. Pristor, 2 D. Chipman (Vt.) 115; Daniels v. Pand, 21 Pack, 307; 6 Greenl, 222; Gallagher v. Shipley, 24 Md. 418; Plamor v. Plumer, 30 N. H. 558. See Ruckman v. Outwater, 28 N. J. L. 581.

An organ placed in a recess titted for it in a church held to be a fixture as between yendor and vendae; Rogers r. Crow, 40 Mo. 91; Strickland v. Parker, 54 Me. 263; Thomas v. Davis, 76 Mo. 72. Timber trees, cut down and lying at full length on the ground where they grew, will pass by a deed of the land; Brackett r. Goddard, 54 Me. 309. So growing crops and manure lying upon the land, fencing materials on a farm, though temporarily detached but with no intent of diverting them from their use; Goodrich v. Jones, 2 Hill 112. So hop poles used in cultivating hops; Bishop v. Bishop, 1 Kenan 123 (N. C.). What is in its nature, otherwise personal property, will when actually or constructively attached to the soil, by its use or intended use, become a part of, and pass by a deed of the realty; Jenkins r. McCurdy, 48 Wis. 628. Conton-gan and press when removable without injury to the freehold are not fixtures as between vendor and vendee; McJunkin r. Dupree, 44 Tex. 500. See Connor v. Squiers, 50 Vt. 680; Coleman v. Stearns' M'f'g Co., 38 Mich. 30.

As to the time within which the tenant can exercise his right of removal of fixtures. — The general rule is that it must be done during or at the end of the term; Hinckley r. Black, 70 Me. 473; Rines r. Bachelder, 62 Me. 95; Towne r. Fiske, 127 Mass. 125; Torrey r. Burnett, 38 N. J. L. 457; Fratt r. Whittier, 58 Cal. 126; Jenkins r. McCurdy, 48 Wis. 628; Overton r. Williston, 31 Pa. 155. See 20 Kan. 430; Josslyn r. McCabe, 46 Wis. 591; Darrah r. Baird, 101 Pa. St. 265; 31 Pa. 155. A tenant whose lease in terms gives the right to remove, at the end of the term, buildings which he has erected on the demised premises, may exercise that right within a reasonable term after the expiration of the term; Smith r. Park, 31 Minn. 70; Griffin r. Ransdell, 71 Md. 440; Youngblood r. Eubank, 68 Ga. If tenant fails to exercise his right of removal within the period of

his term, the presumption is that he relinquishes his claim to his lessor, but this presumption may be rebutted; Railroad v. Deal, 90 N. C. 113. The tenant may remove at the end or during the continuance of his term, trade fixtures which he has annexed to the freehold, but not after he has surrendered possession; First Sudbury Parish v. Jones, 8 Cush. 184; Burk v. Hollis, 98 Mass. 55; Haflick v. Stober, 11 Ohio 482; Davis v. Moss, 38 Pa. 346; Preston v. Briggs, 16 Vt. 124; Moody v. Aiken, 50 Texas 65. See Smith v. Park, 31 Minn. 70. His right of removal once lost, is not renewed by his taking a subsequent lease; Shepard v. Spaulding, 4 Met. 416; McIver v. Estabrook, 134 Mass. 550. See Devin v. Dougherty, 27 How. Pr. 455. When the term is uncertain or depends upon a contingency, as where a party is tenant for life, or at will, he may remove fixtures within a reasonable time after the tenancy is determined; Watriss v. National Bank, ubi supra; Folsom v. Moore, 19 Me. 252; McIver v. Estabrook, 134 Mass. 550. In this last case a tenant at will of a lessee erected a building on the land with knowledge and consent of the original lessor, with the understanding that the tenant at will could remove the house as a trade fixture. After the expiration of both terms, the building not being removed, the lessor resumed possession of the land and then rented the same with other land to the former tenant at will. Held, that the tenant at will could not then remove the building.

There is a class of cases important to be ruled, which point out the distinction between chattels, which have been so attached to the freehold as to become fixtures, and so for the time being part of the realty, and chattels so placed upon the land of another as to remain only chattels personal, as, when a son built a house on the land of his father under an expectation that the father would devise the land to him, it was held that the house did not become a fixture, but remained the personal property of the son; Wells v. Banister, 4 Mass. 513. See Dame v. Dame, 38 N. H. 429; Barnes v. Barnes, 6 Vt. 388; Bewick v. Fletcher, 41 Mich. 625.

Shelving and drawers, placed in and connected with a building under a license from the owner of the building — the relation of landlord and tenant not existing between the parties — were held to remain the personal property of the persons putting them in the building, and they did not become fixtures; Stout

v. Stoppel, 30 Minn. 56; Shapira v. Barney, Id. 59; Brown v. Lillie, 6 Nev. 244; Hill v. Sewald, 53 Pa. St. 271; Russell v. Richards, 1 Fairf. (Me.) 429; Pullen v. Bell, 40 Me. 314; Cresson v. Stout, 17 Johns. 116; Raymond v. White, 7 Cowen 319; Tobias v. Francis, 3 Vt. 425.

An iron boiler placed in a building by a tenant at will, upon a foundation, the edges of the brick work being cemented before the boiler was placed thereon so as to keep it in place, and an iron tank similarly placed, held not to be fixtures, but that they remained personal property of the tenant; Cooper v. Johnson, 143 Mass. 108; Wolford v. Baxter, 33 Minn. 12; McKeage v. Hanover Fire Ins. Co., 16 Hun 239. See s. c. 81 N. Y. 38; Sisson v. Hibbard, 75 N. Y. 542; Early v. Burtis, 40 N. J. Eq. 501.

This distinction between chattels, which do or do not become chattels real as distinguished from chattels personal, seems not always to be carefully observed. See Northern Central R. R. Co. r. Canton Co. of Baltimore, 30 Md. 354; Holmes v. Tremper, 20 Johns. 29; Wetherbee v. Foster, 5 Vt. 142.

As between administrator and heir it was held, that a heavy stove, placed by the intestate in a chimney, having no fireplace and set on brick work so that it was doubtful whether it could be removed without disturbing the brick work, was part of the realty; Tuttle v. Robinson, 33 N. H. 119.

HORN v. BAKER.

HILARY, 48 GEO. 3. - IN THE KING'S BENCH.

[REPORTED 9 EAST, 215.]

A., B. and C., partners and distillers, occupied certain premises leased to A. and another, and used in common in the trade, the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c., afterwards appeared to be in A. the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c., and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife and the survivor; with liberty for C. and J. on the decease of A. and his wife to purchase the distil-house and premises for the remainder of A.'s term, and the stills, vats, &c., mentioned in the schedule; and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased; and there was a proviso for re-entry if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, vats, and utensils on the premises.

- On a question, Whether such stills, vats, and utensile, so continuing in possession of C and J, the new partners, and as I by them in their trade in the same manner as they had been by the former partners, of whom A, the count was one, passed under the stat. 21 Jac. 1, c. 19, so 10 v 11, to the assumes at C, and J, as being in the possession, order, and disposition, at the bankrupts at the time of their bankrupts as regarded owners? and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed cornership (of which reputed cornership the jury are to judge from the circumstances); held,
- 1. That the stills which were fixed to the tracked did not pass?. the assignees under the words goods and chattels in the statute.
- 2. That the rats, we, which were not so find did joss to the assignces, as being left by the true of mer in the possession, ander, and disposition (as a appeared to the eye of the world) of the bankrupts, as reputed owners.
- 3. That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders; a that might have related to the presumption of awarship arising from the presession and apparent order and disposition of them.

This was an action to recover in damages the value of the interest which the plaintiff claimed in certain stills, vats, and utensils, which the first count of the declaration stated that she was entitled to, subject to the use thereof by the datendants during her life; and that, being so entitled, and the defendants well knowing the same, they wrongtully and injuriously broke and destroyed part, and sold and disposed of the rest. The second count was in trover for the same goods; to which the defendants pleaded not guilty; and upon the trial before Lard Ellenborough, C. J., at the Middlesex sittings after the last Term, a verdict was found for the plaintiff for 1000%, subject to the following case.

The plaintiff is the widow and executrix of her deceased husband John Horn, who, before, and at the time of making the indenture on the 20th of March, 1801, after mentioned, was a distiller in Southwark.

The defendants are the assignees of Wm. Horn and R.

Jackson, who succeeded John Horn in the business of a distiller, and carried on the same until they became bankrupts, as after mentioned. At the time of making the said indenture John Horn held the principal part of the messuages, buildings, and lands whereon he had carried on the business of a distiller in partnership with Robert Horn and William Horn, and whereon there had been erected a rectifying distil-house, under a lease granted to him and R. Jackson (since dead) for a term which expired on the 30th of December, 1804; and he held other parts of the premises under another lease granted to him and the said Richard Jackson, since deceased, for a term which expired on the 24th of June, 1805: and he and the said Richard Jackson, now deceased, had before held other parts of the premises under a lease for a term which expired on the 25th of December, 1799. The above-mentioned partnership, which was a losing concern, expired before the making of the indenture hereinafter mentioned; and William Horn, at the time of making that indenture, and at the death of John Horn, was and now is indebted to the estate of John Horn in 500l. in respect of their partnership. By indenture dated 20th of March, 1801, between John Horn of the one part, and William Horn and Rd. Jackson (the bankrupts) of the other; after reciting the said several leases, and that at the time of making the last lease, the said Rd. Jackson (deceased) was in partnership with John Horn; and that John Horn had lately entered into partnership with Wm. and Robert Horn for a term then expired; and that since the expiration of the last-mentioned lease the premises therein comprised had been used and occupied by John, Robert, and Wm. Horn, as yearly tenants; and that the partnership between John, Robert, and Wm. Horn had before the execution of that deed been dissolved by mutual consent; and that it had been agreed between John Horn of the one part, and Wm. Horn and Rd. Jackson of the other part, that John Horn should withdraw from the business as from the 1st of March then instant, in favour of Wm. Horn and Rd. Jackson, and permit them to use, occupy, and enjoy the said distil-house, and other the premises mentioned in the indentures of lease, and the several vats, stills, and utensils of trade therein or thereon, and which vats, stills, and utensils were specified in the first schedule written under that indenture, in consideration of an annuity of 600l. to be paid to John

Horn, his executors, &c., during the life of himself and Llanbeth his wife (the now plaintiff) and the life of the supplyor subject to terms and conditions bereliative expressed, and reciting farther, that it had been agreed that the dabts due to John, Robert, and Win. Hurn, as late sorgermore, and also all the horses, earts, drays, and cooks, of the late repartmentage (except the rate, stills, and atereds monthmed in the said men schedule), should be valued and purchased by Wan Horn and Rd. Jackson; and that a valuation had been made as widingly; by which it appeared that such debts, and the value of such horses, &c., amount to 1815/.; for payment of which a boul had been given by Wm. Horn and Rd. Jackson to Julin Horn; and that Wm. Horn and Rd. Jockson, by another bond, had been bound to John Horn in 5000% conditioned for juyment of the annuity of 600/, per annum to John Horn for the lives of himself and his wife (the plaintiff), and the survivor; he, John Horn, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of Wm. Horn and Rd. Jackson, for himself, his heirs, executors, &c., covonanted and agreed with Wm. Horn and Rd. Jackson, their expontors, administrators, and assigns, that they, and and truly paying the rents received by the several recited leases, and performing all and simpular the covenants and agreements therein contained on the lesses' and assignees' parts, and also duly and rogularly paying the and annaity so secured as aforesaid, should and lawfully might peaceably and quirtly have, hold, use, weapy, possess, and exact the said messuage, tenement, distil-house, and premises thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and also the said stills, vats, and things specifical in the first schedule, during the lives of John Horn and Elizabeth Horn, or the survivor, without any let, suit, &c., of John Horn, his executors, &c., or any person lawfully claiming from him, &c. Wm. Horn and Rd. Jackson, by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that, in case the annuity should be in acrear for two valendar months, John Horn, his executors, ge., might reenter the distil-house and premises, and the same with all and every the stills, vats, and things mentioned in the said schedule have again, repossess, and enjoy as in his former estate, &c.

There was also a covenant, that upon the decease of the survivor of John and Elizabeth Horn, Wm. Horn and Rd. Jackson should be at liberty to purchase the distil-house and premises for the remainder of the term in the leases, and the stills, vats, and things mentioned in the said schedule. And another covenant that Wm. Horn and Rd. Jackson should keep the said stills, vats, and utensils in repair; and in case they should not purchase the same, that they should at the end of the agreement deliver them up to John Horn, his executors, &c., in good condition, reasonable use and wear excepted. (Then followed the schedule referred to of the different stills and vats, numbered in order, and describing the quantity in gallons which each would contain.) The case further stated, that Wm. Horn and Rd. Jackson took possession of the premises immediately on the execution of the indenture of agreement, and carried on the trade of distillers, and from time to time paid the interest on the bond and the annuity to John Horn, who died about four years ago, and who by his will gave all his property to his wife, the plaintiff, and appointed her sole executrix. Since (a) the death of John Horn neither the annuity nor the interest of the bond for 1815/. have been regularly paid; but the plaintiff, as she from time to time was in want of money, and notwithstanding the annuity and interest might not then be due, applied to Wm. Horn and Rd. Jackson, who paid her different sums on account of such annuity and interest; and also by her order occasionally paid sums to various persons for her use, and supplied her with liquors and spirits as she from time to time ordered any, so that there was a running account between them and the plaintiff. The following memorandum was signed by John Horn, and indorsed on that part of the deed in the possession of Wm. Horn and Rd. Jackson: viz. "I the within-named John Horn do hereby undertake and agree to accept and take 500l. by equal quarterly payments instead of 600l. for the first year's annuity within referred to." To this memorandum there was no date. nor did it appear when it was made. The following indorsement or receipt was also written on the said deed, and signed by the plaintiff as executor of John Horn: viz. "March 1st, 1802. Received of the within-named Wm. Horn and Rd.

⁽a) What follows down to the letter a on the next page was added by argument.

Jackson 500l, being one year's annuity due from them this day for the purposes specified herein." There was also the following indorsement on the same deed signed by Elizabeth Houn: "March 1st, 1803. Received of the within-named Wm. Horn and Rd. Jackson 500%, being one year's annuity due from thom this day for the purposes specified herein." The first memorandum appeared to be in the handwriting of the solicitor who drew the deed; the two last receipts were in the handwriting of Rd. Jackson. For many months previous to the bankrupter of Wm. Horn and Rd. Jackson the plaintiff found great difficulty in obtaining money from them; and she permitted the annuity and interest to run in arrear; and notwithstanding the same were more than two months in arrear, the plaintiff did not make any claim to resenter the premises, as by the deed she had the power to do: but in May, 1805, brought an action in this court against Wm. Horn and Rd. Jackson to recover the arrears of the annuity, as also to obtain payment of the bond for 1815/. and interest; to which action they pleaded eight several pleas, upon seven of which issue was joined; and to the eighth plea Elizabeth Horn demurred: which demurrer was argued, and judgment given for Elizabeth Horn, and notice of trial of the said issues had been given at the time of the bankruptcy; but in consequence thereof that cause was not further proceeded in; and there was due for the arrears of the annuity and interest on the bond for 1815l, at the time of the bankruptey, about 600l. (a). In April, 1805, the plaintiff, after her husband's death, renewed the leases of the several premises. Wm. Horn and Rd. Jackson occupied the premises, with the stills, vats, and utensils thereon, and carried on the trade of distillers from the time of executing the indenture of the 20th of March, 1801, to their bankruptcy. A commission of bankruptcy issued against Wm. Horn and Rd. Jackson on the 26th of July, 1806, and they were duly adjudged bankrupts on the 28th; and the messenger under the commission immediately took possession of the demised premises, and also of the vats, stills, and utensils then being thereon. The defendants were afterwards chosen assignees, and an assignment of all the estate and effects of Wm. Horn and Rd. Jackson was duly made to them: upon which notice was given by the plaintiff to the defendants that the several vats, stills, and utensils were the property of the

plaintiff, subject to the supposed interests of the bankrupts therein. The things mentioned in the deed, and comprised in the first schedule, consist of stills and vats. The (a) stills, five in number, were set in brick-work, and let into the ground. Three vats or worm-tubs were supported by and rested upon brick-work and timber, but were not fixed in the ground. Sixteen other vats stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor (c). The vats were of wood bound round with iron: the stills were of copper, and connected with some of the vats: other of the vats were also connected and communicated with each other by conductors or pipes. Three stills and vats were in the rectifying distil-house. There were also a great number of other vats under the rectifying distil-house; some of which were standing on brick and timber, and others on horses or frames as above: and which were connected with the vats and stills in the rectifying distil-house. Others of the vats stood on horses or frames as above described. All the vats in the rectifying distil-house stood on their ends; as did nine of those under the distil-house: the other vats under the distil-house lay on their sides or bilge. The defendants contending that the vats, stills, and utensils, in the said first schedule contained, belonged to the bankrupts at the time of their bankruptcy, have sold them as part of the estate and effects of the bankrupts. The plaintiff contending that the same belong to her as executrix of her late husband, by virtue of his will (subject to the use thereof by the assignees in right of the bankrupts during her life), has brought this action to recover in damages the value of her interest therein. The question was, Whether the plaintiff was entitled to recovery? it being agreed that if the plaintiff were so entitled, the amount of the damages should be settled out of court.

This case was argued in Michaelmas term last by Burrough for the plaintiff, and Dampier contra; and again in this term by Williams, Serjt. for the plaintiff, and The Attorney-General for the defendants. The additions to the case which have been noticed were made between the first and second argument.

For the plaintiff (after stating that the question turned on the stat. 21 Jac. 1, c. 19, ss. 10 & 11), the attention of the court was called to the preamble to the 11th sect. set forth in the con-

⁽a) What follows down to the letter c was added by consent to the case after the first argument.

clusion of the 10th; though it was admitted that the modern eases had put a construction upon the comming clause beyond the particular mischnet routed. The statute reciting "that it often falls out that many persons before they become bookrapts do convey their goods to other men upon good colouby tion. yet still do keep the same, and are reputable or over the fi and dispose the same as their own; " for comoly much, that "If any person shall become built upt, and, it such tune as they shell so become bankrouts, shall, by the communit and permission of the true owner and proprietary, have in their pure mon, order, and disposition, any goods in chattels whereof they shall be reputed owners, and take upon them the sule, alteration or disposition as numers;" in every such case the commissioners shall have power to sell and dispose the same for the benefit of the creditors, &c. Giving effect to the words of the preamble, the true object was to deprive particular creditors of their spentic lien on goods, which having been the property of the bankrupt. had been secretly conveyed by him to such qualitors, who surfored him still to continue in possession and appear to the world as the owner. That provision was made in the case of bankrupts in order to avoid the doubt which had avisen upon the stat. 13 Eliz. c. 5 (a) against trandulant conveyances to defeat and delay creditors in general cand which doubt still exists on the statute of Elizabeth), whether it were not confined, as at common law it certainly was, to avoid the conveyance as against those only who were creditors of the party at the time. Wherefore the statute of James extended the provision to all the creditors, as well those who low one such afterwards as those who were such at the time of the conveyance. But still constraing the two statutes together, as made in papi multivia, many great lawyers have considered that the preamble in the 10th sect, of the stat. 21 Jac. 1, c. 19, controlled the emetment in the 11th sect, and confined the operation of the statute to cases where the property conveyed to a particular creditor was before that time the property of the bankrupt himself. Of this opinion was Lord C. J. Holt, and the Court of K. B. in L'Apostre v. Le Plaistrie (h), and Lord C. B. Parker, and Lord Hardwicke in Ryall v. Rolle (c): though the contrary has since

⁽a) See Twyne's Case, ante, vol. i. (c. 1. Atk. 175, 182; and 1. Ves. p. 1, et notas. 365, 371.

⁽b) Mich. 1708, cited 1 P. Wms. 318.

been held in Mace v. Cadell (a). Still, however, the court will not go further than the latter case; nor say that the statute shall attach in every instance where a trader is in possession of another man's goods at the time of his bankruptcy, if he were not held out to the world as the ostensible owner by the real proprietor, as in that case the bankrupt had been; the true owner having there held out the bankrupt as her husband, and having obtained a licence for the public-house where they lived in his name. But taking the preamble not to control the operation of the enacting clause, still, in order to bring the case within that clause, the bankrupts must not only have such goods in their possession, order, and disposition at the time, by the consent and permission of the true owner, according to the first part of the clause, but they must also have taken upon them the sale, alteration, and disposition of them, as owners, by the same consent and permission; for these words run through both parts of the sentence: and it must appear either by the terms of the contract between the bankrupts and the true owner, or by evidence dehors of the nature of the property, or of the place or circumstances of the possession, and that the owner trusted the bankrupts with the power of selling, altering or disposing of the goods as owners; or that having the possession, order, and disposition of the goods under such circumstances as might induce the world to believe that they had such a power, the bankrupts did actually sell, alter or dispose of them as owners. In Walker and others, assignees of Bean v. Burnell (b), household goods and furniture, which were left by the assignees under the first commission so long as seven years in the bankrupt's possession; yet having been so left for a special bonâ fide purpose, in order to assist the bankrupt in settling his affairs, and getting in his effects for the creditors; and the bankrupt not having the disposition of the goods so as to sell them; were decided not to be within the statute of James. It was admitted even in Mace v. Cadell, that every instance of a possession of goods of another by a bankrupt at the time of his bankruptcy was not within the statute; but it was said that the cases of factors, executors, trustees, &c. were excepted cases: but the words of the 11th clause, if not restrained by the preamble, are general, and would include those which are called

⁽a) Cowp. 232.

exceptal cases, as well as any others; they are not, therefore, excepted by the statutu itself in turms, but only by construction as not falling within the reason of it: the statute only ittaching on the possession of goods by the bankrupt when such possession is fraudulant; where the true owner has the bunks rupt with the power of selling, altering or dispusing or the goods, as owner. And though, parliaps, the bare fact of the possession of chattels may be primit treis evidence that the possessor is the true owner, and has the mover of sile, &c., as owner, yet the contrary may be shown, and that the possition of the bankrupt was bomi kile, and connecent with the right of the time owner. A factor is intrusted with the highest power over the goods, the power of sale; but bursuse it is not as owner, but as factor, which is consistent with his possession and with the rights of the true owner, the case is not within the statute. The same may be said of trustoes and executors. So here, the bankrupts had "the possession, order, and disposition" of the goods under the indonture, as he are and not as owners; and they had not the sale or alteration of them at all, nor the disposition of them as numers, so as to affine the props erty in any way, but only the bure use of them. In some cases the circumstances attending the possession may carry an appearance to the world that the possessor has the sale, alteration, or disposition of the goods, as owner; as where goods usually sold in a shop or wardhouse are exposed to view there; and from thence a power to sell, &c., by the consent of the owner who permits this to be done may be fairly implied: but no such inference can arise here, where some of the vats, &c., were actually fixed to the freehold, and others apparently so, and the rest were used in like manner as those which were fixed, and all of them were numbered. In this case the pro-action was at least equivocal, so as to let in the truth of the awnership. It was just as likely by the mere view of the things that they be longed to the owner of the premises, as to the traders who were in possession. They all formed one entire apparatus for distilling, part of which was actually fixed to the freehold: and therefore the bare possession and use of them carried no greater evidence of title than the possession of the premises themselves. And on this ground, Buller, J., in Waller v. Burnell (a), held that the furniture of the house left in possession of the bankrupt did

not pass under the statute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been bonâ fide, and not made for the purpose of giving him a false credit, and the bankrupt's possession and mode of using the property was consistent with such contract, the case has never been held to be within the statute. In Copeman v. Gallant (a), though Lord Cowper considered that the preamble did not restrain the enacting words of the clause: yet he held the case not to be within it in regard that the assignment, which was for payment of the debts of the assignor, was with an honest intent. Ryall v. Rolle (b), the property, which originally belonged to the bankrupt, was by him mortgaged and conveyed at different times to several persons; he continuing all the time in possession. That was a fraud directly within the express words of the law. In Mace v. Cadell (c) there was direct evidence of fraud on the part of the true owner; she herself having taking out a licence for the public-house, where the goods were, in the name of the bankrupt, to whom she said she was married; and having at first claimed the goods under a bill of sale from him. Bryson v. Wylie (d) was decided altogether upon the ground of trick and fraud. There was an open sale of a dyer's plant to the bankrupt, and afterwards a private resale by him; notwithstanding which he still continued to keep possession upon payment of a pretended rent. Gordon v. The East India Company (e) was the case of goods invested by the true owner in the name of an officer of one of the Company's ships, as his privilege, whose property they appeared to the world to be: and which was therefore calculated to deceive his creditors. So in Lingham v. Biggs (f), a creditor, having taken in execution the furniture of a coffee-house keeper, permitted him to remain in possession of it under a rent; who therefore appeared to the rest of the world to continue the owner of it in the same manner as before; there being nothing done to notify the change of property, which was clearly fraudulent even within the preamble of the statute. But in that case Lord C. J. Eyre, speaking of Bryson v. Wylie, said that, notwithstanding that decision, he could sup-

⁽a) 1 P. Wms. 320, 1.

⁽b) 1 Atk. 165, and 1 Ves. 349.

⁽c) Cowp. 232.

⁽d) Hil. 24 Geo. 2 B. R., cited in note (a), 1 Bos. & Pull. 83.

⁽e) 7 Term Rep. 228.

⁽f) 1 Bos. & Pull. 82.

pose that a dver might be in possession of a plant without being the reputed owner. And he also supported the decision in Collins v. Furber (a), which has been questioned (b). But admitting that there were some circumstances of frond in the last mentioned case, the principle there established, which has not been questioned, was, that where the bankrupt was in possession of the goods at the time of his bankrupurs, with the consent of the true owner, hond f b, for a special purpose, beyond which he had not the right of alteration or disposition. it is not within the statute. The case of Duby v. Smith (c) was considered as an absolute sale of the goods by the trustees of the wife and children to the husband, whom they suffered to continue in possession till the day before his bankruptoy without his paying the stipulated instalments. It would have been useless to have discussed any of these cases if the bare act of possession of the goods or another by a benkrupt at the time of his bankruptcy were sufficient to bring a case within the statute. Now here, by the terms of the dood, the bankrupts had no power over the vats, stills, and utensils in their possession, except the use and repair of them as lessees; they had not the general, but only a special order and disposition of them by the consent of the true owner; and they had no power of sale, alteration, or disposition of them at all as owners. But if the consent or permission of the true owner mentioned in the first part of the 11th clause be not carried to the "sale, alteration, or disposition" mentioned in the latter part; at least those words must be intended of an actual sale, alteration, or disposition of the things by the bankrupt, in order to band the true owner: for the words of the act are "and taken upon them (the bankrupts) the sale, &c., as owners;" which is not pretended to have been one by the bankrupts in this case. Consistently with the deed, the lessees could not even have removed these goods from the premises demised to any other place, without an implied breach of covenant, to be collected from the whole deed; for they were all scheduled and numbered, and let as an entirety; and if displaced, it could not be told how the num-

⁽a) 3 Term Rep. 316.

⁽b) By Lawrence, J., in Gordon v. The East India Company, 7 Term Rep. 237, who now again intimated great doubts of that case, as did also Lord Ellenborough. The former referred

to Mr. Uullon's observations on that case, which he said were very sensible. Cull. Principles of the Bankrupt Laws, 318.

⁽c) 8 Term Rep. 82.

bers applied, and the object of numbering them would be defeated.

It was also objected to the plaintiff's title, that the possession of the lessees at the time of their bankruptcy was not consistent with the deed: because they were only to hold so long as they performed the covenants and paid the annuity reserved; and there was a proviso for re-entry in case such annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrears for a longer time. To this it was answered that the words of the indenture whereby John Horn covenanted that the lessees "performing all and singular the covenants and agreements therein contained, &c. and also duly and regularly paying the annuity, &c., should quietly possess and enjoy, &c. the premises, and also the stills, vats," &c., were not words of condition, on the breach of which the lessees were no longer to hold over, but in law were only words of covenant on the part of the lessees, for the breach of which a remedy lay upon the covenant; as was determined in Hayes v. Bickerstaffe (a). Then, though there was an express power of re-entry, in case of such arrear, vet it could not have been executed under the circumstances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having also paid bills for her; and this account was not liquidated. But to warrant a re-entry there must be a demand of the precise sum due, which could not be told by the plaintiff at the time. Besides, as in the case of rent reserved quarterly, when two quarters have elapsed the lessor cannot re-enter for the first quarter, but only for the last; having slipped his opportunity for the other after another quarter has become due; so here the plaintiff could only have re-entered for the last payment in arrear. But supposing in strictness that the plaintiff might have re-entered, yet as it would not have been prudent to do so, she will stand excused for waiving the exercise of an odious right of forfeiture, against which a court of equity would of course have relieved the lessees on payment of the arrears: and this, ever since the stat. 4 Geo. 2, c. 28, s. 2, if the application for relief were made within six months (b).

For the defendants, it was contended that the possession of

the bankrupts was not consistent with the deed, for by that, in the event which happened or the amounty falling into arrear. the plaintiff was entitled to enter and take possession of the goods in question, instead of which she left them in the posession of the traders; and brought an action for the urbars. which was defeated by their bankruptcy. As to the difficulty of making a demand for the precise sum before recentry, the strictness of law in that respect only applies to cases ut reentry for non-payment of rent where the demand must be on the land, and not to the repossession of goods for non-payment of an annuity for which they were a scounty, in which case the demand may be made anywhere. However, if a previous demand of the precise sum were necessary, the difficulty of ascertaining it, occasioned by the act of the annuiting herself, would be no reason why as between these parties she should be excused for not having made it. If she were cutified to possession under the deed in the event which happened, and by taking the necessary measures, whitever they might be, would have been in possession, the subsequent possession of the bankrupt was against the stipulations of the deed; and this brings the case within Darley v. Smith (1), which is very like the present in its circumstances; for there the trustee had a right to enter and re-possess himself of the goods, if the stipulated payments were not made; and having neglected to do so, after default made in all but the first instalment, the possession of the bankrupt was held to be within the statute; though as between the parties to the contract the transaction was bond fide, and no fraud in fact intended. But admitting that the possession of the bankrupts was in pursuance of the dead, it does not follow that their possession was not without the statute. If this were so, every case of this sort might be taken out of the statute. The possession of a mortgagor of goods, is not inconsistent with his title, and yet it has never been doubted since Ryall v. Rolle (b) that it was within the statute. It is the reputed ownership of the goods in the possession of the bankrupt which brings the case within the express words of the statute, the avowed object of which was to defeat those secret conveyances, by which personal property is secured to particular creditors, while to the eye of the world it is left in the possession, order, and disposition of the bankrupt, who by

means of it obtains a false credit. It is now fully settled since the case of Mace v. Cadell (a) that the preamble does not control the enacting words of the 11th clause of the act. But it is argued, that the bankrupt must not only have the possession, order, and disposition of the goods, with the consent of the true owner, but also the power of sale, alteration, and disposition, by the same consent. Certainly the bankrupt need not have actually sold and delivered; for then the question would never arise, as was observed by Eyre, C. J., in Lingham v. Biggs (b); for the act only gives the assignees of the bankrupt power to appropriate goods in his possession. But the same learned Judge says, that "if a man be reputed owner of the goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, alteration, and disposition within the meaning of the statute." Neither could it be the meaning of the statute that the bankrupt should be the true owner of the goods, because, as Lord Hardwicke said, in Ryall v. Rolle (c), the Legislature has explained its sense by putting the words true owner in opposition to the reputed owner. could it mean that the bankrupt should have the power of sale, fr., by the consent of the true owner: for then his selling or otherwise disposing of them would be no breach of the private contract between them. In every case where any question can arise, the reputed ownership of the bankrupt must be limited, as between him and the true owner, by some secret stipulation abridging the general right of disposition: and it was the very object of the act to prevent the operation of such secret engagements, which enabled traders to obtain a false credit by means of the apparent or reputed ownership which their visible possession of the goods of others gave them. It is no question, therefore, in these cases what is the real contract in the deed; for that could not be known at the time to third persons who were dealing with the trader. The only question which can be made, consistently with the words and objects of the statute, is, whether the trader in possession at the time of his bankruptcy had the apparent order and disposition of the goods? If to the eye of the world he appeared to be the owner of them, or was, as the statute calls him, the reputed owner, the case is within the statute: though in truth there was a secret conveyance or

⁽a) Cowp. 232.

⁽b) 1 Bos. & Pull. 87.

agreement by which the property was made over or sourced to another. This, as was said by Buller, J., in Waller ; Boonell (a), must always be more a question of fact than of hex. When the fact of the reputed ownership is obody ascert and, the law follows of course. Every man, sa. . Lyra, C. J., in Lingham v. Biggs (b), who can be said to be the regular in or. has incidentally the order and disposition of woods; and it he be reputed owner, and appear to have the order and disposition of them, he must be understood to have taken apan himself the sale, order, and disposition, within the meaning of the statute. And if the real owner do not take such means as may be at his power to prevent the public being imposed upon by such false appearance, that is the very mischief mount to be remultial by the act; and the bankrupt must be taken to have the pussession, order, and disposition of the goods by consent of the owner: and the being in possession under such draumstances, from whence the order and disposition of the goods may be reasonably inferred, makes the reputed ownership. Now here every circumstance of notoricty tended to show that the bankrupts were the true owners of the goods, whather considering the possession before the indenture of the 30th of March, the time and circumstances under which the bankrupts took possession under that deed, the avowed purpose for which it was made, or the continued possession and the apparent ownership of the bankrupts after the transfer in the same manner as before. William Horn, one of the bankrupts, had been in partnership with John Horn, the testator, before the transfer; they carried on business jointly upon the same premises, and had a joint use of the vats, stills, &c., and to the eye of the world at least the property belonged to the partnership, however it might be as between themselves. Rd. Jackson had also an interest with John Horn in the lease. The business was a losing concern; and John Horn wishing to get out of it, appeared to the world to withdraw himself from it; and Wm. Horn appeared to continue in possession of the premises, and of the vats, stills, and utensils for carrying on the business, together with Rd. Jackson, and to exercise the same acts of ownership as he had done before when in partnership with John Horn. But in fact John Horn had secretly conveyed this property to

⁽a) Dougl. 317, and vide this noticed by Eure, C. J., in Lingham v. Brygs.1 Bos. & Pull. 89.(b) 1 Bos. & Pull. 87.

Wm. Horn and Rd. Jackson, saddled with the annuity to himself and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other persons dealing with the partnership; the deed was kept secret from them; the object of all the parties being, that the trade might be carried on by the existing partners with the same apparent capital as the old firm, and that the credit of the new partnership might not be lessened by the general knowledge of the fact, that the goods in question were not their property. The secrecy of the transfer was as much for the benefit of John Horn as of the continuing partners; for if their credit were shaken, they would be less able to pay the stipulated annuity. In fact, the bankrupts did gain a false credit by the possession of the goods in question. There is no fact of notoriety to resist the conclusion that these were the goods of the bankrupts; and the only fact relied on to show that the property was not theirs, is the secret indenture of the 20th of March, 1801, by which a prior claim on the goods was secured to John Horn; but such a secret transfer is of the very species of fraud which the statute meant to guard against. The case of Bryson v. Wylie (a) cannot be distinguished from this in principle. The bankrupt there had the possession of the dyer's plant, but he had not paid for it: he therefore agreed to assign it to the creditor, and to take it again on lease from him. There was no mala fides or fraud in the transaction between those two; and if the interests of no other person had been concerned, it was only just and reasonable that the creditor should have had his security; yet that was avoided by the operation of the statute, as fraudulent in law against the creditors in general. The case of Darby v. Smith (b) is strong to the same point. The case of Walker v. Burnell (c) turned as it seems on the notoriety of the goods which were left in the bankrupt's possession continuing the property of the assignees under the first commission: but that is a very doubtful case. The honesty of the intent of the true owner cannot be sufficient to protect the goods; for according to the report of Copeman v. Gallant in 7 Vin. Abr. 89, Lord Cowper said, "If possession and disposition be given to a person who becomes bankrupt though no intent of fraud appear; yet, if it give a false credit, there is the same inconvenience as if

⁽a) Hil. 24 Geo. 3 B. R. cited in 1

⁽b) 8 Term Rep. 82.

Bos. & Pull. 83.

⁽c) Dougl. 317.

fraud were intended, &c.; and it matters not whother it were by fraud, or only by neglect, or out of a human;" And this was admitted in $Bucknell \times Registra (x)$ in the case of a bunk-

ruptev.

In the course of the argument, Grass, J., asked whother there was any usage in the trade for distillers to hire or low vats. stills, &c., with their premises? To which it was answered by the defendant's counsel that no such usago appeared; and une less it were expressly found by the case, the presumption would be, that things necessary to carry on the trule were provided by the traders themselves; and that the passession of such things, which were of great value, must naturally give more credit to the distillers than the more view of the sparits distilled, which often belonged to others. Lord Ellenburnigh, C. J., also observed at the conclusion of the argument, that nothing had been said with respect to the distinction between such of the vats and stills as were affixed to the freshold, and those that were moveable, and would be the subject of trover; between which, he said, the court thought there was a material distinction; the words of the statute of James being goods and chattels. And upon asking The Attorney General whether he meant to insist upon the right of the assignces to such of the articles as were affixed to the freehold and referring ham to Roull v. Rolls, and being answered in the negative, his Lordship said, that if the rest of the court agreed with him in opinion as to the right of the assignees to such of the articles as properly tell under the denomination of goods and chattels, it would be better to leave it to a referee to assertain out of court the difference of the value for which the verdict should be entered.

Lord Ellenborough, C. J., then proceeded. — The true object of the statute 21 Jac. 1, c. 19, ss. 10 and 11, was to make the reputed ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the real ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appears, were fixed to the freehold; and as such, we think, would not pass to the bankrupt's assignees under the descriptions of goods and chattels in the statute. But as to the vats and utensils, there is nothing in the case to rebut the

reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership when the trade was carried on by John, Robt., and Wm. Horn. Before the deed of the 20th March, 1801, though John Horn might have had a priority of claim to the stills, vats, and utensils, as between him and his partners; yet to the eye of the world the apparent ownership of them was in the partners, John, Robert, and William Horn. After the deed John demised these things to Wm. Horn and Rd. Jackson, who continued to carry on the trade after he had retired from it, finding it to be a losing concern; and instead of reserving a rent, he reserved an annuity payable to himself and his wife and the survivor of them, with a liberty to the new partners to purchase these articles on the death of such survivor. Under this agreement Wm. Horn and Richard Jackson continued in possession of the property, carrying on the trade in the same manner as was done before; and to the eye of the world the property of these goods appeared to be vested in them in the same manner as it appeared to be in the former partnership. As between the parties to the contract, the new partners could not, indeed, sell, alter, order, or dispose of the property but according to the provisions of that deed: but as to the world in general, they appeared to have the same right over it which the former partners had. Had they not then the reputed ownership? If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such a usage, there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners ought to be answerable for the consequences, and was so intended to be by the statute. For some time it was vexata quæstio whether the preamble controlled the

enacting words, so as to confine the operation of the statute to cases where the bankrupt was the original owner of the purperty conveyed by him to the particular creditor; but the chanting words have been long held not to be so controlled. Here, in fact, the bankrupts were only lessues of those goods; but that was a secret known only to the parties them does and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it. This is a case then which comes within the larg construction of the cuarting words. The case of Bryson v. Wylle bears strongly on the present; for that was not the case of a mortgagor keeping posession of goods, as might be supposed from the note of what was said by Lord Mansheld: but the plaintiff, who was the original owner of the plant, finding that Simpson, to whom he had sold it on the security of two promissory motes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to Sunpson at a rent: under which agreement Sumpson continued in possession of it up to the time of his bankruptey. Mr. Justice Buller there distinguished the case from that of a banker or factor who by the course of trade must have the goods of other people in his possession; and therefore it did not hold out a talse credit to the world. He meant therefore to say, that where the possesssion did hold out a false credit to the world, there the statute would follow it, and attach upon the goods. And the cases of Mace v. Cadell, and Lingham v. Boggs, are authorities to the same purpose. The principle to be deduced from all of them is, that where the reputed ownership of the goods in the trader is permitted to be held out to the world, it shall, with respect to the world, be considered as the real ownership. I do not enter into the question whether the bankrupt's possession were consistent with the deed; because that would only apply to the time after which the plaintiff might have re-entered for nonpayment of the annuity. Her not doing so might, perhaps, be argued as more distinctly showing her intention to exhibit the apparent ownership of the bankrupts to the world; but I lay no stress on it: for, in my view of the case, however consistent their possession might have been with the deed, it would only have shown that the deed itself was the fraud which the statute meant to guard against. The principle is, that in all cases where, by the consent and permission of the true owner of

goods, a trader in possession has the apparent ownership, and incidental to that the order and disposition of them; and no other circumstance appears to control such apparent ownership, and show that the trader was not the real owner; the true owner permitting the trader to exhibit this appearance does it at his peril.

Grose, J. — The case of Mace v. Cadell has put a construction upon the statute, which has ever since settled that where the real owner of goods suffers a trader to have the reputed ownership, so as to have the apparent order and disposition of them, and the trader becomes bankrupt, the statute gives the property to the assignees for the benefit of the creditors. I only doubted whether the stills which were fixed to the freehold would pass under this statute; but it is now agreed that they do not. But with respect to the other articles, it is impossible to distinguish this case in principle from the current of those which have been decided, which have gone upon the ground, that where the real owner enables a trader to acquire credit by having possession, and apparent order and disposition of goods with respect to the world, he does in effect permit such trader to take upon himself, and he has with respect to the world, the apparent sale, alteration, and disposition of the goods, within the meaning of the statute.

Lawrence, J. — The question in these cases, as was observed by Mr. Justice Buller in Walker v. Burnell, is rather a question of fact than of law. And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time; for if the true owner suffer a trader to have the reputed ownership of goods left in his possession, and become bankrupt, the statute says that the property shall go to his assignees. In this case, therefore, we are rather called upon to consider, as upon a motion for a new trial, what conclusion a jury should have drawn from this evidence, than to consider a dry question of law. The facts stated are, that one partner, upon retiring from business, leases to others who continue it (one of whom had been in partnership with him before), certain stills, vats, and utensils proper for carrying on the business, and which had been used by the former partners. The new partners become, in consequence, to the world the apparent owners of the property. It may happen, from the course

of certain trades, that masses of machinery are let out by the owners to the mechanics engaged in them, and the notoriety of such a usage in the trade may rebut the presumption of ownership which would otherwise arise from the possession; but in general the possession of utensils of trade must be taken to be by the owners of them. And I agree, that nothing turns upon the question whether or not the possession of the bankrupts in this case were consistent with the deed under which they claimed from John Horn: for the very object of the statute was to prevent the true owner from enabling another to hold himself out to the world as such, and thereby gain a false credit; and this being a secret deed, the world could know nothing of its contents. It was pressed in the course of the first argument, that the reputed ownership mentioned in the statute must be understood where there was a power of sale confided to the bankrupt by the true owner; and reference was made to the words of Lord Mansfield in Mace v. Cadell, that the statute did not extend to all possible cases where one man had another man's goods in his possession, as the case of factors, &c., who have the possession as trustees, &c., to sell for the use of their principal: "but the goods must be such as the party suffers the trader to sell as his own." But this last expression was evidently used in contradistinction to the case of factors, &c., who sold for other persons and not for themselves. And he could not have meant to lay it down generally; for that was not the case of a sale: but the facts there were, that the owner let the bankrupt into her house, where he passed as her husband: but she never gave him the power of selling the goods, and he never had sold them; yet by treating him as her husband she had given him the reputation of being the owner of the goods; which was held to bring the case within the statute. As to the case of Bryson v. Wylie, on which my Lord has observed, Lord Mansfield certainly considered the whole as a trick and contrivance to evade the statute: and what was said by Mr. Justice Buller goes the whole length of our opinion in this case: that a factor, who must in the course of his business have other persons' goods in his possession, does not thereby gain a false credit; but that where the conduct of the true owner enables another in whose hands the goods are, to hold out to the world the reputation of ownership, he thereby gives that other a false credit to the extent of the property so confided; for which the

statute meant to make him responsible. It is often a question of fact, whether the possession of goods do hold out a reputed ownership in the possessor, as in the case of furniture in lodgings. In the present case the opinion which we have formed from the facts stated will make it necessary to inquire which of these articles are fixtures, and which are not: and for the value of the fixtures when ascertained, and beyond that, for the damage which may have been done to the house in removing the fixtures, the plaintiff will be entitled to recover.

Le Blanc, J. - The question is, whether the bankrupts having obtained the reputed ownership of the moveable utensils of the trade by possession of them before and at the time of the bankruptcy, acquired the real ownership by the statute for the benefit of their creditors? I lay out of consideration the question of re-entry of the plaintiff: for I do not think that it makes any difference in this case. This decision will only be an authority for a case where the bankrupts were in possession of utensils necessary for carrying on their trade under a lease; and where there was no usage of the trade for the trader to have such utensils let to him on hire. Wherever such a usage of trade may prevail, the case may deserve another consideration. I must take it upon the facts here disclosed, that John Horn was the owner of the utensils in question before the deed of March, 1801; though that fact is very clumsily stated in the case: the court, however, considers that by some means or another, which do not distinctly appear, these utensils were the property of John Horn; and he demised them to the bankrupts, who were to carry on the trade after he withdrew from it; and without these articles he could not have carried on the trade; and there is no usage in the trade for letting such utensils. The question then is, whether under these circumstances, the bankrupts had the possession, order, and disposition of the goods by the consent of the true owner? I think they had. For though there are many exceptions, as in the case of factors, bankers, and others who are known to have the goods of other persons in their possession; none of which, it is true, are expressly excepted in the statute; yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house, and perhaps even to furniture let

without the house to be used there, where such lettings were usual; and, by a parity of reason, to utensils of trade usually let to the traders; because possession in such cases would not earry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor.

The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them.

ONE of the points decided in this case, m_1 , that m, such as the stills in the text, are not "goods and chattels" within the meaning of the Bankrupt Act, so as to pass to the assigness or new to the finite [as goods in the ordering or disposition of the bankrupt has been officed in second subsequent cases, and the course of bankrupt has been officed in second subsequent cases, and the course of bankrupt by it good after a second have made no difference in this respect, though some complexity arises from the fact that in the Bills of Sale Acts with that of its 4 to 18 V to 18 In the course are be initial in the designation personal chatters, see so 1, 3 to 200 to 10 M.

In Clark v. Crowsshow, ... B, a Ad seed the does on of the court was expressly founded on the authority of Horn v. Baker. In Coombes v. Benumont, 5 B. & Ad. 72, it was held, that a steam engine of soil to the freehold for the purpose of working a colliery and to be seed by the terral during his term, the property remaining in the landlord, would not pass to the tenant's assignees. The steam-engine, said Park J. If affect to the freehold, clearly does not pass to the assignees, because it does not come within the description of 'goods and chattels,' in 6 G. 4, c. 16, s. 72. This was determined in the case of Horn v. Baker, and since that case, as far as my experience goes, I never knew that any distinction was made on week such hatters as would be removable between landlord and tenant, and such as would not."

In Boydell v. M'Michael. 1 C. M. & R. 177 the same doctrine was again affirmed and acted upon by the Court of Exchequer. In that case, a tenant for years, who had taken the fixtures at a valention from his landlord, mortgaged the term and fixtures, and afterwards became bankrupt, they were held not to pass to his assignees. "The real nature of the tenant's interest," said Parke, B., "in this case is, that he had a right to remove the fixtures during the term: that interest has been held sufficient to enable the sheriff to seize them under a \(\tilde{u}\), \(\tilde{u}\),

In Hallen v. Runder, 1 C. M. & R. 266, cited in the beginning of the last note, the court thought that fixtures could not properly be denominated goods in an indebitatus count, though their value might be recovered in a count for fixtures bargained and sold, [and see Lee v. Gaskell, 1 Q. B. D. 700]. And in Minshall v. Lloyd, 2 M. & W. 450, Parke, B., said, "I assent to the doctrine laid down in Coombes v. Beaumont, and Boydell v. M'Michael, that such fixtures are not goods and chattels within the meaning of the bankrupt law,

though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors."

In Trappes v. Harter, 3 Tyrwh. 603, 2 C. & M. 183 (which is said by Parke, B., in Minshall v. Lloyd, 2 M. & W. 450, to have been doubted), trading fixtures were held to pass to the assignees of certain bankrupts, as part of their property, and the assignees having severed and removed them, it was held that a mortgagee of the premises (the mortgage deed having been decided by the court not to convey these fixtures) could not maintain case against them for injury to his reversion. This decision, it will be seen, is not at all at variance with Horn v. Baker. Undoubtedly if the fixtures did not pass by the mortgage deed, the assignees [or, now the trustee] would take them; and whether as personal estate or not seems immaterial. See the note at the end of the report of Trappes v. Harter, 2 C. & M. 183; [the observations on this case in the judgment in Walmsley v. Milne, 7 C. B. N. S. 133]; Pim v. Grazebrook, 3 M. & G. 863; and Thompson v. Pettitt, 10 Q. B. 101.

It is conceived that a personal chattel fixed to the freehold in order to the more convenient use of the chattel as such, as was the case with the machine in *Hellawell v. Eastwood*, 6 Exch. 295, would not be within the above-mentioned exception of fixtures from "goods" in the reputed ownership section of the Bankrupt Act.

[In Ex parte Tweedy, 5 Ch. D. 559, a liquidating debtor who was assignee of a lease deposited with certain bankers by way of equitable mortgage the instrument whereby the lease had been assigned to him, which also contained an assignment by distinct words of certain machinery and trade fixtures for a separate consideration. The mortgagees had suffered the bankrupt to remain in possession of the fixtures. The point actually decided was, that without a memorandum duly registered as a bill of sale, the deposit was invalid against the trustee $qu\hat{a}$ the fixtures; but Bacon, C. J., expressed an opinion that had the objection based upon the Bills of Sale Act failed, the fixtures and machinery would have passed to the trustee as being in the order and disposition of the debtor, with the consent of the true owner.

Where a portable steam-engine was mortgaged by the owner, but left by the mortgagee in the possession of the mortgagor, who lent it on hire to a third person, and became bankrupt, it was held that the engine passed to the mortgagor's assignees, under the reputed ownership clause of the 12 & 13 Vict. c. 106, although the chattel was not at the time of the bankruptcy in the actual possession of the bankrupt, but was by his permission in the actual possession of the person to whom he had lent it. *Hornsby* v. *Miller*, 1 E. & E. 192; see also *Freshney* v. *Carrick*, 1 H. & N. 653.

The question whether goods are in the order and disposition of a bankrupt by the consent of the true owner is a question of fact, not of law: Acraman v. Bates, 2 E. & E. 456; Ex parte Emerson, 41 L. J. Bcy. 20; and is to be determined by taking all the circumstances into consideration, such, for instance, as the custom of a particular trade; but the knowledge or ignorance of an individual creditor, as to the ownership of goods, is not material: Ex parte Watkins, re Couston, L. R. 8 Ch. 520; Ex parte Vaux, L. R. 9 Ch. 602; see also Ex parte Lovering, L. R. 9 Ch. 621. But the custom must be such that the ordinary creditors of a debtor must be presumed to have known it: Ex parte Powell, 1 Ch. D. 501, C. A. As to what evidence of custom is sufficient, see ibid.; Ex parte Hattersley, 8 Ch. D. 601. As to the custom of hiring furniture by hotel keepers and others, see Crawcour v. Salter, 18 Ch. D. 30, 51 L. J. Ch. 495; Ex parte Brooks, re Fowler, 23 Ch. D. 261; Ex parte

Turquand, re Parker, 14 Q. B. D. 636, 54 L. J. Q. B. 242. Where the true owners have done all in their power to obtain possession of their property the presumption of their consent is thereby rebutted. It is to N. B. Bank, L. R. 15 Eq. 69; I. r. parte. Ward, L. R. 8 Ch. 114; and see I. parte. Managing 1 Ch. D. 554, C. A.; I. r. parte. Philips, re I stick, 4 Ch. D. 10.

The case of Horn v. Buker is a useful one on account of the light thrown by the discussion in it on the construction of the reputed ownership clause in the Bankrupt Act. At the time of the decision in the principal case that subject was governed by 21 Jac. 1 c. 19, ss. 10 and 11, which were at first so little acted upon, that no case occurred in which their operation was discussed for upwards of a century. The former of these two sections is a mere recital made by a misprint into a separate section, and gave rise to some doubt, in consequence of its being narrower than the enactment, so that it apparently applied only to property which have once been the bankrupt's; and it was for some time thought that such property only was included in the eleventh section, an idea which the analogy to the statutes respecting fraudulent conveyances appeared to countenance. These de illes however, were removed by Mace v. Col. H. Cowp. 232; and the comexants recital, which was omitted in 6 Geo. 4, c. 19, s. 72, and succeeding statutes, fis also omitted in 46 & 47 Vict. c. 52 (The Bankruptey Act, 1883), s. 44, by which the subject is now governed. That section like the corresponding sections of former enactments, is with some differences to be noted hereafter, substantially identical in form with the enactment of James, the decisions upon which are consequently for the most part authorities on the construction of the present law.

Choses in action, however, other than trade debts are expressly excluded from the operation of the present as from the late enactment, 32 & 33 Vict. c. 71, s. 15. Shares in a company were held not to be choses in action within this exception: Exparte Union Bank of Membester, reduction, L. R. 12 Lq. 354; a decision which was followed by the Court of Appeal, Fry. L. J., dissenting, in Colonial Bank v. Whinney, decided under the Act of 1883, 30 Ch. D. 261; 55 L. J. Ch. 585. On appeal, however, the House of Lords reversed this decision, and held that such shares were "things in action," 11 App. Ca. 426. See also Exparte Barry, L. R. 17 Eq. 113. A debenture of a company is a chose in action, Exparte Rensberg, 4 Ch. D. 685; so is a policy of insurance, Exparte Ibbetson, 8 Ch. D. 519. As to what were debts due within the section, see Exparte Kemp, re Fastnedge, L. R. 9 Ch. 383.

Moreover, now as under the late Act (ss. 15, 17), property in the reputed ownership of the bankrupt vests in the trustee upon his appointment (see s. 54), without an order of the Court, which was necessary before the statute of 1869), see *Hestop v. Baker*, 6 Exch. 740.

[The property dealt with by the reputed ownership clause of the present enactment is thus described:—"All goods" which by s. 16s includes "all chattels personal") "being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt. in his track or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." The words in italics are new.

The words "in his trade or business." which are substituted for the words "being a trader," of the late act, limit the operation of the clause, see Ex

parte Lovering, 24 Ch. D. 31; 52 L. J. Ch. 951; Ex parte Nottingham, &c., Bank, re Jenkinson, 15 Q. B. D. 441; 54 L. J. Q. B. 601; Colonial Bank v. Whinney, supra, though the introduction of the words "or business" extends it to a class of persons who not being traders were not covered by the former enactment; see as to what is a trade or business, In re Wallis, ex parte Sully, 14 Q. B. D. 950.

The words of the former section "of which he has taken upon himself the sale or disposition as owner" are omitted. Goods left with the bankrupt on sale or return, were held not to come under the former clause until he had exercised his option of keeping them: Ex parte Wingfield, in re Florence, 10 Ch. D. 591.

So of goods consigned by a manufacturer to an agent for sale at an advance to be fixed by the agent and retained by him, he guaranteeing the accounts, were held not to be in the reputed ownership of the agent: Ex parte Bright, re Smith, 10 Ch. D. 566.

Although fixtures, as we have seen, [were] not within the meaning of the reputed ownership clause, all personal chattels [fell] within it. Ships, Stephens v. Sole, 1 Ves. 352; Atkinson v. Maling, 2 T. R. 462; Hay v. Fairbairn, 2 B. & A. 193; Monkhouse v. Hay, 2 B. & B. 120; unless, in the case of transfers by way of mortgage, such transfers [had] been registered before an act of bankruptcy, 17 & 18 Vict. c. 104, ss. 66-75; [Choses in action, which are now expressly excepted;] Furniture, Lingham v. Biggs, 1 B. & P. 82; Utensils of trade, Lingard v. Messiter, 1 B. & C. 308 (except, perhaps, when, as hinted in the principal case, there [was] a usage to demise them to the trader), [were] all of them, if in the possession, ordering, or disposition of the bankrupt, as reputed owner, with the consent of the true owner, at the time of his bankruptcy, [held to] pass to his assignees, by virtue of the 12 & 13 Fict. c. 106, s. 125.

[A dormant partner's share of partnership goods was held to be within that section, *Reynolds* v. *Bowley*, L. R. 2 Q. B. 41, 474; but a share in a partnership being a chose in action would be excluded from the operation of the present Bankruptcy Act: *Ex parte Fletcher*, 8 Ch. D. 218.]

In Gibson v. Overbury, 7 M. & W. 555, a distinction was drawn between the actual paper, or other material on which a contract is written, and the benefit of the contract itself, and in that case a pledge was holden sufficient to pass the paper on which a policy of insurance was written, although, for want of notice to the office, the right to the money insured remained in the assignces of the bankrupt. See also Belcher v. Campbell, 8 Q. B. 1; [Green v. Ingham, L. R. 2 C. P. 525, where Gibson v. Overbury was distinguished] and as to whether goods mortgaged by a trader before his bankruptcy, but in the hands of the sheriff under an execution against the bankrupt, can be considered to be in his order and disposition with the consent of the true owner, see Fletcher v. Manning, 12 M. & W. 571.

[The doctrine of reputed ownership applies only to goods in the sole possession of the bankrupt as sole reputed owner, Ex parte Dorman, L. R. 8 Ch. 51; Ex parte Fletcher, 8 Ch. D. 518; but goods may be in the order and disposition of one partner "in his trade or business," although his business is that of the partnership, and the goods are assets of the firm, Colonial Bank v. Whinney, 30 Ch. D. 261; 55 L. J. Ch. 585; where shares bought for partnership purposes and with partnership funds were held to be in the order and disposition of the partner in whose name they were registered. The judgment of the C. A. on this point does not appear to be affected by the subse-

quent reversal of their decision upon other grounds by the House at Loros II App. (a.426). As to the diapparent possession under the Holland San Act. 1854, of one of two joint makers of a following side see L - part $R_{\rm Holl}$ = 1.2 Ch. D. 389.

It may be observed here that fixtures were comprised within the words "personal chattels" as used in the 100s of Sub Act 15 to 17 to 18 Viet c. 36). These words were defined by 8.7 of the act to the management ture, fixtures, and other articles capable of complete transfer by delivery."

The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), also includes flatures, but in a limited sense, as defined by the act under the designation personal chartels, and contains provisions dealing with difficulties which are an effective to this question under the former enactment. (See the autes to Fig. 4 Many, and 1

It also, by 8, 20, excluded from the operation of the reputed ownership clauses of the Bankruptcy Act, goods comprised in a bill of sale, duly registered in compliance with its provisions, there is allering the law as intrinoun in Badger v. Share, 2 E. & E. 472, and other cases decided under the former statute, but that section has been repealed as to all bills of sale executed after the 1st November, 1882, by the Bills of Sale Act, 1882, and the law is thus restored to its former fooding so I provided to the fooding so I provided to I provided t

As to the difference between reputed tweership and capparent possession under the Bills of Sale Acts, see I(r) performed, A(r), Associate I(r), r Francis, 10 Ch. D. 408.

WAIN v. WARLTERS.

EASTER. - 44 GEO. 3.

[REPORTED 5 EAST, 10] (a).

No person can, by the Statute of Frauds, be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word agreement must be understood the consideration for the promise, as well as the promise itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that parol evidence of the consideration was inadmissible by the Statute of Frauds; and consequently, such promise appearing to be without consideration upon the face of the written engagement, it was nuclum pactum, and gave no cause of action.

The plaintiffs declared that at the time of making the promise after mentioned they were the indorsees and holders of a bill of exchange, dated the 14th of February, 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay to his, Gore's order, 56l. 16s. 6d.; which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had

⁽a) [Now by s. 3 of the Mercantile guarantee need not appear upon the Law Amendment Act, 1856 (19 & 20 face of the written engagement. See Vict. c. 97), the consideration of a post in notâ.]

retained one A, as their attorney to suc Core and Hall respectively for the recovery of the said sum so due, Ac., whereof the defendant, at the time of his promise, &c., had notice. And thereupon, on the 30th of April, 1803, at, Ac., in consideration of the premises and that the plaintiffs, at the instance of the defendant, would forboar to proceed for the recovery of the said 567, 16s, 6d., he, the defendant, undertook and promised the plaintiffs to pay them, by half-past four o'clock on that day, 56%, and the expenses which had then been increed by them on the said bill. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have litherto forlorne to proceed for the recovery them of; and that the expenses by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said A., and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called special capias, against Gore and Hall respectively on the said bill, amounted to 20%, of which the detendant had notice: yet the defendant did not, at half-past four o'clock on that day, &c., nor at any time before or since, pay the said sum of 56% and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs, at the trial at Guildhall, produced the written engagement signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you by half past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters (and dated), No. 2, Cornhall, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, was in writing, as required by the Statute of Frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was, therefore, nudum pactum and void. And Lord Ellenborough, C. J., upon view of the Statute of Frauds, 29 Car. 2, c. 3, s. 4, which avoids any special promise to answer for the debt of another, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c., thought that the term agreement imported the substance at least of the terms on which both parties consented to contract, and included the consideration moving to the promise, as well as the promise itself: and the agreement in this sense not having been reduced to writing for want of including the consideration of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule nisi was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the promise or binding part of the contract to be in writing, and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and Lawes showed cause against the rule. — The question is simply this, Whether parol evidence can be given of an agreement which the Statute of Frauds avoids, unless it be in writing? The words are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c. Now to every agreement there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say that the parol evidence offered of the consideration, namely, the forbearance to sue Hall, did not go to contradict the written promise: it is enough that being part, and a material part of the agreement, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and

this would be letting in all the dangers of fraud and perjury which it was the object of the statute to guard against. Upon the face of the paper the debt appears to be the dubt of another; and as a mere promise to pay the debt of another, without any consideration, would, before the statute, have been vind as nudum pactum at common law: so it is not made good by the statute without a consideration in law for enturing into such an agreement; which agreement, i.e., the whole agreement or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been desfared on as in writing, the mere production of the note could not have proved the consideration of forboarance laid in the declaration; and such consideration could not have been supplied by parol evidence. In Preston v. Merceau (1), where the plaintiff had agreed in writing with the detendant's testator to let him cortain premises at a certain rent; parol evidence tendored to show that the tenant had agreed to pay a certain sum for ground-rent to the ground landlord, was rejected as subversive of the Statute of Frauds; although it was there contended that the evidence offered did not go to alter but to explain the agreement. So in Gunnis v. Erhart (b), the verbal declaration of an auctioneer, at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

Erskine and Marryat, in support of the rule said, that the evidence tendered in the two cases cited went not to explain but to contradict the written agreements; in the one case to increase the quantum of the rent specified, in the other to subtract so much as the charge amounted to from the value of the estate, which was offered for sale free from incumbranes. But here the parol evidence went merely to show on what occasion the written agreement had been entered into: and it is in common practice to admit parol evidence for such a purpose: it is part of the res gesta, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the promise by the defendant to pay the debt of Hall. This,

before the Statute of Frauds, might have been proved wholly by oral testimony, but since that statute the promise can only be evidenced by writing signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult indeed to account for the introduction of the word agreement into the latter part of the clause, which, in its strict sense, as compounded of "aggregatio mentium, or the union of two or more minds in a thing done or to be done "(a), is more properly applicable to the other branches of the clause, namely, "an agreement on consideration of marriage, or upon contract or sale of lands, &c., or upon any agreement not to be performed within the space of one year," &c., than to any special promise by an executor to answer damages out of his own estate, or to any special promise to answer for the debt, &c., of another. such promises the word agreement can only be considered applicable so far as it is synonymous to engagement or undertaking, in which sense it is often used in common parlance, and therefore means in this respect the agreement or promise to pay the debt of another. Besides, the statute does not require the whole agreement to be set out in form, but it is sufficient if there be a note or memorandum of it in writing; that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words, therefore, the promise is made, which before the statute would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute, under the like circumstances. But in either case the inducement for making such promise, which is part of the res gestæ, may be evidenced by parol. Thus, suppose a promise in writing to pay the expenses attending a certain bill drawn by another; parol evidence must necessarily be let in to show to what bill the promise was meant to apply, and how the expenses arose, and the bill itself would be produced. And this would be evidence not to vary, but to corroborate the written promise. The 3rd, 7th, and 17th sections of the act all require the signature of the party to some note in writing in order to charge him with the several subject-matters of those sections. But in all those cases the party must be charged on the special written agreement; but here he is charged on the promise, of which the writing is only evidence. Yet the 4th section sup-

⁽a) 1 Com. Dig. 311.

poses that the party is to be charged upon the agreement, "unless the agreement upon which such action shall be brought," As a which shows that agreement as there used no this no more than undertaking or engagement. And in this sense in agreement signed by one party only on a sale by anction was holden sufficient to charge him within the Statute of Francisca. (Lord Ellenborough, C. J. There it was deemed sufficient proof of such agreement so as to charge the party signing it. He was estopped by his signature from protecting limited under the statute. But there the consideration appeared in writing a They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word agreement had never before received such a construction as applicable to this branch of the clause.

Lord Ellenborough, C. J., after nothing the definition of the word agreement by Lord C. B. Campus, who considered it as a thing to which there must be the assent of two or more minds, and which, as he says, ought to be so cortain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of Planden; and better (his Lordship observed) could not be cited:

In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the Statute of Frauds has the word agreement counless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing "Ac.). And the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale (b), one of the greatest judges who ever sat in Westminster Hall, who was as com-

haps than by Lord *Hale's* having left some loose notes behind him, which were afterwards unskilfully digested, 1 Blac. 99.

⁽a) Seton v. Slade, 7 Ves. jun. 265.

⁽b) Lord Mansheld expressed a doubt of this in Wyndham v. Chetwynd, 1 Burr. 418, any otherwise per-

petent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special promise; but without a legal consideration to sustain it, that promise would be nudum pactum as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause, but still in order to charge the party making it the statute proceeds to require that the agreement, by which must be understood the agreement in respect of which the promise was made must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the agreement should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by Comyns, Plowd. 5 a. 6 a. 9, to which may be added Dyer, 336. b., all show that the word agreement is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word agreement in the statute, which appears to be the most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been

relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it.

Grose, J. - It is said that the parol evidence tendered does not contradict the agreement; but the question is, whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself' Now the words of the statute are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the account upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. What is required to be in writing, therefore, is the agreement (not the promise, as mentioned in the first part of the clause), or some note or memorandum of the agreement. Now the agreement is that which is to show what each party is to do or perform, and by which both parties are to be bound; and this is required to be in writing. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For, without the parol evidence, the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the agreement, by which must be understood the whole agreement, should be in writing.

Lawrence, J.— From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my Lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but it goes on to direct that no person shall be charged on such promise, unless the agreement or some note or memorandum thereof, that is, of the agreement, be in writing; which shows that the word agreement was meant to be used in a sense different from promise, and that something besides the mere promise was required to be stated. And as

the consideration for the promise is part of the agreement, that ought also to be stated in writing.

Le Blanc, J. - If there be a distinction between agreement and promise, I think we must take it that agreement includes the consideration for the promise as well as the promise itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless the promise or agreement upon which the action is brought, or some note or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word agreement, which means the consideration for which as well as the promise by which the party binds himself.

Rule discharged.

The main point involved in this case has been already discussed in the note to Birkmyr v. Darnell, ante, vol. i. The case of Wain v. Warlters is, however, one of so much celebrity, that it would have been improper to omit it in a selection of leading cases; it was confirmed, as is there stated, by Saunders v. Wakefield, 4 B. & A. 596; and [was afterwards] acted on in numerous cases.

It has been mentioned, ante, vol. i., that the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), provides, by s. 3, that no special promise to be made by any person after the passing of that act (29th July, 1856) to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. The rule laid down in Wain v. Warlters (a rule which some have thought to be hardly consistent with the natural interpretation of the words of the 4th section of the Statute of Frauds, which only required that there should be some "memorandum or note" in writing of the agreement of guarantee) was altered by the legislature, because it was found, in practice, that it led to many unjust and merely technical defences to actions upon guarantees.

The note to this case deals with the questions arising upon that portion of the 4th section which provides that a guarantee shall be signed by or on behalf of the party to be charged; and as this provision is still in force, the note is retained in this edition.

In Durrell v E vas. I H & C 174 in Cam Search reversing the decision in the court below, 641 a N 650, the name of the person to be charged the buyers was written at the top of a note of the contract by a factor who collducted the sale. The court was of opinion that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing up a record of the contract binning on the man and that if he was the writing of the name of the buyer at the head of the memorandum was a sufficient signature within the 17th sect. "Noakes" (the factor), said Mr. Justice Crompton, "drew out a note of the contract with the names of both buyer and seller upon it, but it contained nothing which could ordinarily to called a signature, for the defendant's the buyer's name was written at the head of the document; and if this had been the first case on the subject I should have doubted whether the placing a name at the top of a document could fairly be called a signature; but that is now past discussion, for the cases have decided that it does not signify where the name is placed. If it is put there by the party sought to be charged or some person deputed by blin. It may be at the head, the middle at the cuit or in any part of the noon ment." See also Summaris v. Humble, IRC B N S 2's 12 must, however, be so introduced as to govern or authenticate every material and operative part of the instrument. For a case where the name of the party to be charged was introduced in different parts of the paper, but so as to relate only to those particular parts, not to govern the whole contract, see to thin v Caton, L. R 2 H. L. 127.1

In Johnson v. Dodgson, 2 M & W. 653, the following note, written by the defendant, was held sufficiently signed to satisfy the 17th section of the statute: —

9 Lods, 19 October, 1836

"Sold John Dodgson othe defendant 27 peckets Fingstell, 1856, Sussie, at 1038. The bulk to answer the sample

"4 pockets Selme, Beckley's, at 95s Samples and invoice to be sent by Rockingham coach. Payment in Brukers at 2 menths.

" Signed for Johnson Johnson & Co. the plaintiffs).

" D Mars "

"The Statute of Frauds," said Lord Abinger, C. B., "requires that there should be a note or memorandum of the contract in writing signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it then slowed, or whether he left it so unsigned because he refused to complete it."

[In Sarl v. Bourdillon, 1 C. B. N. S. 188, the sellers of goods entered a list

of the goods which had been purchased in an order book, on the fly-leaf at the beginning of which the names of the sellers were written; the buyer wrote his name and address in this book, at the foot of the entry which referred to the goods. It was held, that under these circumstances there was a sufficient signature of the contract by the party to be charged, and that the names of the sellers appeared on it sufficiently to satisfy the Statute of Frauds.]

But it would seem from the case of *Hubert* v. *Treherne*, 3 M. & G. 755, that, if it appear *upon the face of the instrument itself* that the parties contemplated a further signature in order to complete it, the insufficiency of the signature is *matter of law*; thus an agreement containing the names of the parties, and concluding with the words "as witness our hands" without any other signature, was held not to be sufficiently signed within the 4th section of the statute, and Mr. Justice Maule observes—"In cases of this description two questions may occur: first, whether the agreement contains that which the Statute of Frauds requires, which is a question of law; secondly, whether the agreement has been signed by the party to be charged therewith, or by a person authorized by such party so to do, which is a question of fact. I think this rule (to enter a nonsuit) should be made absolute on the first point."

[Where alterations made in a written memorandum after it had been signed by the defendant were subsequently assented to by him, the contract was held binding, and parol evidence was admitted to show that he had assented to the alterations, Stewart v. Eddowes, L. R. 9 C. P. 311; Sanderson v. Graves, L. R. 10 Ex. 234; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Stevens v. Dowsey, 1 C. P. D. 220.]

In Coles v. Trecothick, 9 Ves. 951, Lord Eldon said that "where a party principal, or person to be bound, signs as what he cannot be, a witness, he cannot be understood to sign otherwise than as principal." But in Gosbell v. Archer, 2 A. & E. 500, where the purchaser affixed his signature to an agreement for the sale of land, and underneath was written, "Witness, Joseph Newman," in the usual place for a witness's signature, Joseph Newman being the clerk of the auctioneer employed to sell the premises, it was urged that Newman must be taken to have signed as agent for the vendor, and it was attempted to show a ratification of his agency. But the court was of opinion, that he signed simply as a witness; and Lord Denman, C. J., said that "he thought the above remark of Lord Eldon open to much observation; that no such decision had been actually made; and that, if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument." And see the judgment of Baron Parke in Doe d. Spilsbury v. Burdett, 9 A. & E. 971; S. C. in Dom. Proc. 6 M. & Gr. 386. See, however, the observations of Sir Edward Sugden upon the judgment of Lord Denman in this case, in which he vindicates the remarks made by Lord Eldon in Coles v. Trecothick, 1 Vend. and P., 14th edition, 143.

[Although it has been settled ever since the case of Simon v. Metivier, 1 Bl. 599, that the auctioneer is the agent of both the buyer and seller, and that a memorandum made by him of the bargain is a sufficient compliance with the terms of the statute (see Beer v. London and Paris Hotel Co., L. R. 20 Eq. 412), the agency of the auctioneer exists only at the time of the sale, and he cannot, at a subsequent day, bind the parties by his signature: Mews v. Carr, 1 H. & N. 484. On a sale of land subject to conditions, the entry in

the auctioneer's book must refer to the conditions of sale so as to decelly them, Rishton v. Whitemer's the D-107. As to a significant by an air time eer's clerk, see Prize v. toof, L-R-2Q-B-210. One of the parties to the contract cannot sign the name of the other so as to bind from Sharms, . Bretzelt, L-R-6-Q-B-720.

In Murphy v. Boss. L. R. 10 Ex. 120, the plaintiff's traveller, on table 2 in order from the defendant whole down in the presente the defendant's traveller and the description and price of the goods in a partity printed form and the defendant a copy of what he had written, the control strategic shine D. W. Evans, sup, held that there was no exhibit not ship, to be in a good within the statute. A signed entry in a broad the man has 80% but to bind both parties: Thereps in v. Gertner, 1 C. P. D. 778.

In Smith v. Webster, 3 Ch. D. 49, the following letter signed by the defendant's solicitor, and addressed to the plaintiff's solicitor, was had not be sufficient to bind the defendant: "W. (the defendant) has been with us to-day and stated that he had arranged with your client for the sate to the latter of the Goiden Lion for "All. We therefore some her with draft contract for your perusal and approval. The signature of the charmen of a company to the minute book may be sufficient to bind the company within the Statute of Framis. All say 1 to 10 to 10 10 11.

Whether the initials of the party to be charged are a sufficient signature within this statute seems clear although not very clearly occoled. It has stated in Mr. Roscoe's work upon Lymone, who obtune in real that a signal ture by initials is not sufficient within the meaning of the statute, and Jacob v. Kirk, 2 M. & Rob. 221, and 8 of a L = M = W 452 were effect as authorities for that position, whilst Sir Roward Segilen oftes these two cases in support of the statement, that "it is sufficient, it seems, if the initials of the name are set down;" 1 Vend. & P., 14th edition, 144: the cases themselves do not appear to decide very distinctly either way. A mark, however, seems clearly to be a sufficient signature within the statute, and the Court of Queen's Bench decided, on the 5th and 6th sections of the statute, that no inquiry ought to be allowed as to whother the party making the mark could write: Burry Danny, s A 1. 21 and It as was in the t decided in that case, a mark made by a person who can write be a sufficient signature, it appears strange that it should cease to be so when the mark assumes the shape of the maker's initials - It has now have as the mon the above reasoning, that a signature by initials is a suffer at signature a our the Wills Act: In the gravity of Bloodity, 5 P. D. 115; 40 L. J. P. D. Alexander also the cases cited in Troter, apply v. William resp. L.C. B. N. S. 101 - 2 L. J. C. P. 60; where a notice of objection to the name of a voter was held to be sufficient, although the surveyor of the objector (being his askal mode of signing) was wholly illegible, so that an ordinary person una quainted with the signature could not, by perusing it with ordinary skill and dillig nee, find out what name it was intended to designate. In B and to Bennatt, L R 3 C. P. 28, a notice impressed with a stamped tre-shallo of the objector's signerture was held to be sufficiently signed, but see In the games of Jenkens, infor-

The Wills Act, 1 Vict, c. 26, s. 9, requires that two witnesses "simil affect and shall subscribe the will in the presence of the testator." In the case of Harrison v. Elvin, 3 Q. B. 117, the name of one witness, who could not write, was traced by the other witness holding his hand, and guiding the pen. It was contended that, assuming a mark to be sufficient, this was not even the mark of the witness, but the court held that it was the significant of the

witness and a sufficient attestation; and in *Helshaw* v. *Langley*, 11 L. J. Chan. 17, an agreement was held to be sufficiently signed where the agent who made the agreement (not being able to write) held the top of the pen whilst another person wrote his name; see, however, *Hubert* v. *Moreau*, 2 C. & P. 528, per Best, C. J., but see also S. C. in Banc. 12 B. Moore 216.

[A mark at the foot of the will with a wrong Christian name written against it, the testator being also described by the wrong Christian name in the will itself, has been held to be sufficient under the Wills Act, the court being satisfied that the mark was that of the testator, and that it was made animo testandi. In the goods of Thomas Douse, 31 Law J. Prob. 172. But the court refused to grant probate, on motion, to a codicil at the foot of which the name of the testator had been impressed by a third person, by means of a stamp, at the testator's express direction. In the goods of Jenkyns, 32 L. J. Prob. 71.]

A letter from defendant commencing — "Mr. Stanley begs to inform Messrs. Lobb and Co.," &c., without any other signature, has been considered sufficient within 6 Geo. 4, c. 16, s. 131, to revive a claim barred by a bankrupt's certificate: Lobb v. Stanley, 5 Q. B. 574; and an agreement written by a defendant, commencing - "Mr. Wilmot Parker has agreed," &c., satisfies the 4th section of the Statute of Frauds as a signature by Wilmot Parker: Propert v. Parker, 1 Rus. & Myl. 625 (notwithstanding the doubt in Morrison v. Turnour, 18 Ves. 175). "The object of all the statutes," says Mr. Justice Patteson, in Lobb v. Stanley, " is merely to authenticate the genuineness of the document," and perhaps the result of the cases may be, that the name of the party to be charged, or any mark written or made by him, or by his direction, upon a document in other respects sufficient, for the purpose of authenticating its genuineness, may be a sufficient signature within the Statute of Frauds. [See also Durrell v. Evans, cited supra, p. 278; and Tourret v. Cripps, 48 L. J. Ch. 567, where a letter containing the sender's name, printed at the top, but not signed in writing, was held sufficient to bind him.]

It is not necessary, when an agent signs, that he should sign the name of his principal; if he signs in his own name, parol evidence is admissible to show the agency, and charge the principal on the contract; see the notes to Thompson v. Davenport, post; and in the Prerogative Court it has been held that another person by direction of a testator signing his own name instead of the testator's at the foot of a will, was a sufficient compliance with the 9th section, 1 Vict. c. 26, which requires that the will "shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction." "The act," said Sir H. Jenner Fust, "allows the will to be signed by another person for the testator; here this gentleman, by the testator's request, signed the will for him, not in the testator's name, but using his own name. The act does not say that the testator's name must be used: I think this is sufficient under the act." In the goods of Clarke, Prerog. 20th February, 1839, cited 1 Williams on Executors, 8th edition, p. 84; quære.

[In a modern case in the Probate Court (*Trott* v. *Trott*, 29 L. J. Prob. Cases, 156), the holograph will of Joseph Skidmore began with the words, "I, Joseph Skidmore," and ended as follows, "all of which to be paid . . . and a receipt, to be provided by the receiver, from all further claim upon the estate of their departed brother Joseph Skidmore." The words "Joseph Skidmore" were written on the same line with the preceding words, without any interval between them and the word "brother." The will was not other-

wise signed, and underweath the last words appeared the trunes of two witnesses. The court granted probate of the will hardle 2 the from the more in which the document was framed, the testator must have utrained the words a Joseph Skidmore, at the end of the will to be his signeture.

It is not a sufficient signature by a witness under the Wills Act that intensity the witnesses should acknowledge his previously written arration in the presence of the other, even although he, at the same time, corrects an error in it, and adds the date. Headmarsh v. Catellina, S.H. of L. Cases, 160

Two points of much general importance with returness to control is within the operation of the Statute of Frauds must be here shortly mentioned.

First, although a document may be sufficiently signed within the meaning of the statute, the document itself will not be sufficient, either under the 4th or the 17th section, unless both the contracting parties appear on a littler by name or by sufficient description. A guarantee consequently which does not contain the name of the person to whom it is intended to be given, cannot be enforced, although duly signed by the party to be charged: Williams v. Lake, 2 E. & E. 349; Sathe v. Lambert, L. R. 18 Eq. 1. P. the v. Draft of L. R. 18 Eq. 4; see also Champion v. Plumner, 1 New R. 252; County v. New L. R. 20 Eq. 11; Thomas v. Brown, 1 Q. B. D. 711; Kesster v. Miller, 5 Ch. D. 648, 3 App. Ca. 1124; Cathing v. King, 5 Ch. D. 660; Williams v. Jordan, 6 Ch. D. 517, and Vandenbergh v. Spaceaer, L. R. 1 Lych 416.

In that case, Spaoner was the buyer and Vandenbergh the seller, and the document relied upon to take the case out of the statute was in this form: "D. Spaoner agrees to buy the whole of the lats of markit perclased by Me Vandenbergh now lying at the Lone Collect at 1s per food signed D. Spacker" it was held that the document was not sufficient, as the seller's name, as seller, was not mentioned in it, but occurred only as part of the description of the goods: sed quare, and see Newell v. Radford, L. R. 3 C. P. 52; Surl v. Beardillon, supra.

Secondly, the written note or memorandum required by the 17th section if properly signed and sufficient in other respects, need not be addressed to the other contracting party; a letter, therefore, written by the person to be charged (the buyer to his own up at, referring to letters of the agent stating the terms of the contract and the name of the seller, was held to be a sufficient note of the contract: Gibson v. Holland, L. R. 1 C. P. 1.]

I. General nature of memorandum. — Distinction between written contract and memorandum. — If the contract in its inception be reduced to writing, the statute has no application. The common-law rules of evidence as to the introduction of parol evidence for the explanation of written instruments govern such contracts, and the statute introduced no change in this respect; Wiener v. Whipple, 53 Wisc. 298 (1881); Sievewright v. Archibald, 17 Q. B. 103. But oral contracts are expressly within the terms of the statute, unless evidenced by some note or memorandum in writing. It is plain, therefore, that a memorandum within the Statute of Frauds presupposes a prior

oral contract, valid at the common law, the enforcement of which is barred by the statute. These propositions and distinctions, often disregarded by the courts in the past, are now generally recognized as most important; Saunderson v. Jackson, 2 B. & P. 238; Sievewright v. Archibald, supra; Parton v. Crofts, 33 L. J. C. P. 189, per Erle, J.; Lerned v. Wannemacher, 9 Allen 412, per Hoar, J. See, also, Thayer v. Luce, 22 Ohio St. 62; Williams v. Baeon, 2 Gray 387; Brown v. Whipple, 58 N. H. 229; Ullman v. Meyer, 10 Abb. N. C. 281 (1882); May v. Ward, 134 Mass. 127 (1883); Asheroft v. Butterworth, 136 Mass. 511 (1884); Williams v. Robinson, 73 Me. 186 (1882).

Memorandum signed by defendant alone. — It is generally well settled law that the prior verbal promise of the plaintiff is a sufficient consideration to enable him to recover of the defendant who has alone signed a memorandum; Egerton v. Mathews, 6 East 307; Allen v. Bennet, 3 Taunt. 169; Clason v. Bailey, 14 Johns. 484; Penniman v. Hartshorn, 13 Mass. 87; Williams v. Robinson, supra; Tripp v. Bishop, 56 Penn. St. 424; Perkins v. Hadsell, 50 Ill. 217; Old Colony R. R. v. Evans, 6 Gray 25; Shirley v. Shirley, 7 Blackf. (Ind.) 452; Barston v. Gray, 3 Greenl. (Me.) 409; Douglass v. Spears, 2 Nott & M. (S. C.) Law 207. And the better law is that the same doctrine applies even in equity, in a suit for the specific performance of a contract for the sale of land; Slater v. Smith, 117 Mass. 96; Oliver v. Alabama Life Ins. Co., 82 Ala. 417 (1886). But see Lawrenson v. Butler, 1 Shoales & L. 13, per Lord Redesdale. In a very recent Michigan case, even under the "year" clause of the statute it was held that there was no mutuality unless the memorandum was signed by both parties; Wilkinson v. Heavenrick, 58 Mich. 574 (1886). See Krohn v. Bantz, 68 Ind. 277; Stiles v. McClelland, 6 Col. 89 (1881), accord.

Written offer accepted by parol. — The law would now seem to be settled that a written offer verbally accepted by the offeree constitutes a valid memorandum as against the offerer. This was expressly so decided in England in Reuss v. Picksley, L. R. 1 Ex. 342. There is a dictum to the same effect in Sanborn v. Flagler, 9 Allen 474; and see Justice v. Lang, 42 N. Y. 493; Western Union Telegraph Co. v. R. R. Co. 86 Ill. 246; Lowber v. Connit, 36 Wisc. 176; Lee v. Cherry, 85 Tenn. 707

(1887). The difficulty with this doctrine seems to be that the written offer cannot be viewed in the light of a memorandum since there has been no previous verbal contract; nor, in the absence of all mutuality, can it be considered to be the contract itself. See the language of Bramwell, B., in Watts v. Ainsworth, 31 L. J. Ex. 448, and of Wilde, B. in the same case reported in 1 H. & C. 83. See, also, Munday v. Asprey, 13 Ch. D. 855. And in two recent Massachusetts decisions the court has refused to extend this principle to the case of a written authority to an agent to make an offer; Hastings v. Weber, 142 Mass. 232 (1886); Deherty v. Hill, 144 Mass. 465 (1887). Compare Williams v. Byrnes, 8 L. T. N. S. 69. But see Lee v. Cherry, 85 Tenn. 707 (1887), semble, emtra.

Parol evidence is competent to show that memorandum differs from verbal agreement. In further illustration of the general principle that the memorandum presupposes a presexisting verbal agreement, parol evidence may be introduced to show that it is insufficient to take the promise out of the operation of the statute because it differs in some essential feature from that agreement. Such evidence would of course, on commonlaw principles, be inadmissible, if the memorandum constituted a written contract; Sievewright v. Archibald, supri: Parton v. Crofts, 33 L. J. C. P. 189, per Erle, J.; Archer v. Baynes, 5 Ex. 625; Gibson v. Holland, L. R. 1 C. P., per Willes, J.; Davis v. Shields, 26 Wend, 341; Coddington v. Goddard, 16 Gray 436, per Bigelow, C. J; Leined v. Wannemacher, 9 Allen 412; Gardner v. Hazilton, 121 Mass, 494; Williams v. Robinson, 73 Me. 186 (1882).

Letter written to a third person or in repudiation of the contract.— Moreover, a letter written to the defendant's own agent, or to a third person, which never comes to the notice of the plaintiff, is held to constitute a good memorandum of a previous verbal agreement; Gibson r. Holland, L. R. 1 C. P. 1; Peabody r. Speyers, 56 N. Y. 230; Kleeman r. Collins, 9 Bush (Ky.) 460; Moore r. Mountcastle, 61 Mo. 424; Wood r. Davis, 82 Ill. 311; Moss r. Atkinson, 44 Cal. 3. In Warfield r. Wisconsin Cranberry Co., 63 Ia. 312 (1884), there seems to have been an erroneous application of this doctrine. In this case the defendant undertook, by a letter written to a third person, to accept the written offer of the plaintiff. The court held that this was a good memorandum under the statute. As was

pointed out in the dissenting opinion by Adams, J., it would seem that there was no valid contract between the parties, apart from the statute, since there was no aggregatio mentium. It was not a question of a sufficient memorandum, but of a valid written contract at common law. Compare Banks v. Harris Mfg. Co., 20 Fed. Rep. 667 (1884); Lincoln v. Erie Preserving Co., 132 Mass. 129 (1882).

Whether a letter written by an agent to his principal is a good memorandum, quære. Gibson v. Holland, supra, and Banks v. Harris Manfg. Co., 20 Fed. Rep. 667 (1884) seem to hold that it is not.

A letter written by the defendant to the plaintiff, admitting its terms, but repudiating the contract upon some other ground than the Statute of Frauds, is held to be a sufficient memorandum under the statute; Bailey v. Sweeting, 9 C. B. N. S. 843; M'Lean v. Nicoll, 7 Jur. N. S. 999; Buxton v. Rust, L. R. 7 Ex. 1, 279; Wilkinson v. Evans, L. R. 1 C. P. 407. In the last case, Cooper v. Smith, 15 East 103, Richards v. Porter, 6 B. & C. 437, and Smith v. Surman, 9 B. & C. 561, are distinguished on the ground that in these cases the terms of the verbal agreement were incorrectly stated in the writing signed by the defendant.

Delivery of memorandum unnecessary. — So if the writing never be delivered to any one, but remain in the possession of the defendant, such as an entry in his books, it is held that the requirements of the statute are answered; Johnson v. Dodgson, 2 M. & W. 653; Gibson v. Holland, supra; Argus Co. v. Albany, 55 N. Y. 495; Townsend v. Hargraves, 118 Mass. 325, 335, per Colt, J.; Tufts v. Plymouth Co., 14 Allen 407; Jenkins v. Harrison, 66 Ala. 345 (1880); Drury v. Young, 58 Md. 546 (1882).

Plaintiff must declare on verbal contract.—So the plaintiff must declare in his pleadings upon the original verbal contract; and, unless it be expressly alleged in his declaration that the agreement sued on was verbal, there is no legal cause for demurrer; but the statute must be properly pleaded by the defendant; Babcock v. Bryant, 12 Pick. 133; Quin v. Hanford, 1 Hill 82; Elder v. Warfield, 7 Harr. & J. (Md.) 391; Price v. Weaver, 13 Gray 272; Ecker v. Bohn, 45 Md. 278; Walker v. Richards, 39 N. H. 259; Elting v. Vanderlyn, 4 Johns. 237; Cranston v. Smith, 6 R. I. 231; Petrick v. Asheroft, 20 N. J. Eq. 198;

Adams v. Patrick, 30 Vt. 516; Lawrence v. Chase, 54 Me. Phys. Boston v. Nachols, 47 Ht. 353.

Memorandum must be executed before suit brought. There are many dieta in the reported on as to the effect that the memorandum must be executed before the commencement of the action; Bill v. Bament, 9 M. W. 30, per Parko B.; Trodule a Harris, 20 Pick, 9; Townsend v. Harrises, 115 Mass. 325, 336, per Colt, J.; Bird v. Munroe, 66 Mc. 347, per Petero, J. But it is believed that it has never been newssary to divide the point, and it is hard to see, if the memorandum is not the contract itself, but only evidence of it, why a verbal exceeding executed at any time before trial.

II. Form of memorandum. No special form required. Any note or writing may be a good memorandum under the statute, however informal, and however awkwardly or mutitienally expressed, provided only it be intelligible without the introduction of parol evidence to explain it: Tindal, C. J., in Acadal v. Levy, 4 M. & Scott 220. See, also, Watt v. Cranberry Co., 63 Ia. 730 (1884); Fry v. Platt, 32 Kan. 62 (1884); North v. Mendel, 73 Ga. 400 (1884). Parol evidence, however, is always admissible to explain technical expressions and trade symbols; Spicer v. Cooper, 1 Q. B. 424; Sarl v. Bourdillon, 26 L. J. C. P. 78; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446; Gowen v. Klous, 101 Mass. 449; Drury v. Young, 58 Md. 546 (1882).

It is no objection to the memorandum that it is written in pencil, and a printed paper is equally binding with a written one; Saunderson v. Jackson, 2 B. & P. 238; Pitts v. Beekett, 43 M. & W. 743; Merritt v. Clason, 12 Johns. 102; Clason v. Barley, 14 Johns. 484; McDonel v. Chambers, 1 Strobh. (S. C.) Eq. 347.

It would seem that a paper signed by the defendant will bind him, although formally so worded as to bind the plaintiff only. Such was the case in Penniman v. Hartshorn, 13 Mass. 87, and the defendant was held liable on the memorandum. So a bill of parcels, signed by the seller, is held to be a valid memorandum, although such bills are so worded as to bind the buyer; Saunderson v. Jackson, supra; Hawkins v. Chace, 19 Pick. 502. See, also, Butler v. Thompson, 92 U. S. 412.

Different kinds of writings as memoranda. — Any kind of writing, duly signed, and sufficient in other respects, will con-

stitute a valid memorandum. Thus a letter, Peck v. Vandemark, 99 N. Y. 29 (1885); Hollis v. Burgess, 37 Kans. 487 1887); the return of an officer upon a sale of execution, Reminton v. Linthicum, 14 Pet. 92; Hanson v. Barnes, 3 Gill & Johns. 359; Sanborn v. Chamberlin, 101 Mass. 409, 416; a vote of a corporation, or a city ordinance, duly entered on the records; Tufts v. Plymouth Gold Mining Co., 14 Allen 407; Johnson v. Trinity Church, 11 Allen 123; Chase v. Lowell, 7 Gray 33; Grimes v. Hamilton County, 37 Ia. 290; Argus Co. v. Albany, 55 N. Y. 495; District of Columbia v. Johnson, 1 Mackey (D. C.) 51 (1884), are valid memoranda under the statute. So are telegrams, if intelligible; Godwin v. Francis, L. R. 5 C. P. 295; Hazard v. Day, 14 Allen 487; Tuvan v. Wood, 36 N. Y. 307; Duble v. Batts, 38 Tex. 312; Whaley v. Hinchman, 22 Mo. App. 483 (1886). So a receipt of part payment, or a bond for title, given by the vendor of real estate, if it contain all the stipulations of the contract and a sufficient description of the subject-matter, is a good memorandum of a contract for the sale of land; Barry v. Coombe, 1 Pet. 640; Williams v. Morris, 95 U.S. 444; Smith v. Freeman, 75 Ala. 285 (1885); Thornbury v. Masten, 88 N. C. 293 (1883); Ellis v. Bray, 79 Mo. 227 (1883); Humbert v. Brisbane, 25 S. C. 506 (1886); Wright v. Mischo, 52 Super. Ct. (N. Y.) 241 (1885). So a defective deed of conveyance is a good memorandum; Reeves v. Pye, 1 Cranch (C. C.) 219; Argenbright v. Campbell, 3 H. & M. (Va.) 144; Henry v. Root, 33 N. Y. 526; Welsh v. Coley, 82 Ala. 363 (1886). So it has been held that a deed of conveyance, drawn up and executed with the knowledge of both parties, with a view to the consummation of the contract of sale, constitutes a valid memorandum, though ineffectual to pass title for want of delivery; Jenkins v. Harrison, 66 Ala. 345 (1880). See, also, Bowles v. Woodson, 6 Gratt 78; Blacknall v. Parish, 6 Jones' Eq. (N. C.) 70; Thayer v. Luce, 22 Ohio St. 62; Work v. Corhick, 81 Ill. 317. But see Cannon v. Cannon, 26 N. J. Eq. 316; Overman v. Kerr, 17 Ia. 485; Parker v. Parker, 1 Gray 409; Sanborn v. Sanborn, 7 Gray 142; Sanborn v. Chamberlin, 101 Mass. 409, per Gray, C. J., contra. So it has been held that a deed delivered to a third party as an escrow, may, on the performance of the condition, be enforced by the grantee as a memorandum of a contract for the sale of land; Campbell v. Thomas, 42 Wis. 437 (1887); Popp v. Swanke, 68 Wis. 364 (1887); Cannon v. Handley, 72 Cal. 133 (1887). But see Cagger v. Lansing, 43 N. Y. 550, reversing the decision in 57 Barb. 421, contra. As to entries by auctioneers and brokers in their sales-books and bought and sold notes, see infra.

Incorporation of unsigned writings by reference. It is well settled, both in this country and in England, that the memorandum may consist of more than one writing. It is also well settled that if the different parts are each signed by the defendant, no express reference to each other is necessary. Parol evidence is competent to apply to the contract each part which is duly signed, just as in the case of a single writing parol evidence is admissible for the same purpose. See Jenkins r. Harrison, 66 Ala. 345 (1880), and cases cited infra. But when one paper is signed and the others unsigned, all being necessary to constitute a sufficient memorandum, it is not enough that the different papers can be shown by parol to refer to the same contract, but there must be some reference in the signed paper to those which are unsigned. Thus in the celebrated case of Boydell v. Drummond, 11 East 142, it was held, where the defendant signed his name in a book entitled "Shakespeare Subscribers - their Signatures," that since there was no reference in the book to a prospectus issued by the plaintiff, the two could not be read together so as to establish a sufficient memorandum under the statute. See Saunderson r. Jackson, 2 B. & P. 238; Allen v. Bennet, 3 Taunt, 169; Jackson v. Lowe, 1 Bing, 9; Johnson v. Dodgson, 2 M. & W. 653; Jacob v. Kirk, 2 Mood. & R. 221; Buxton v. Rust, L. R. 7 Ex. 1, 279; First Baptist Church v. Bigelow, 16 Wend. 28; O'Donnell v. Leeman, 43 Me. 158; Jefts v. York, 10 Cush, 392; Rhoades v. Castner, 12 Allen 130; Sanborn v. Nockin, 20 Min. 178; Ridgway v. Ingram, 30 Ind. 145; Thayer v. Luce, 22 Ohio St. 62; Wiley v. Roberts, 27 Mo. 388; Shafer v. Farmers' and Mechanics' Bank, 59 Pa. St. 144; Johnson v. Buck, 35 N. J. L. 338; Frank v. Miller, 38 Md. 461; Fisher v. Kuhn, 54 Miss. 480; Lee v. Mahoney, 9 Ia. 344. So in order that the conditions of an auction sale may form a part of the auctioneer's memorandum they must be expressly referred to therein; Morton v. Dean, 13 Met. 385; Hinde v. Whitehouse, 7 East 558; Kenworthy v. Schofield, 2 B. & C. 945; Rishton v. Whatmore, 8 Ch. D. 467; Riley v. Farnsworth, 116 Mass. 223. Two well-known cases in this country would seem to have been decided in violation of

the well-recognized principle of law now under consideration. The first is Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, in which a bill of parcels was allowed to be read in connection with a memorandum signed by the defendant which contained no reference to it. In fact the bill of parcels was not in existence when the memorandum signed by the defendant was drawn up. In the other case, Lerned v. Wannemacher, 9 Allen 412, it was held that the two parts of a contract drawn up in duplicate could be read together in order to establish a sufficient memorandum, although neither contained any internal reference to the other. Both of these cases have been much criticised, and it is indeed difficult to reconcile them with principle or authority. See the dissenting opinion of Mr. Justice Curtis in Salmon Falls Manf. Co. v. Goddard, supra. See, also, the language of Doe, C. J., in Brown v. Whipple, 58 N. H. 229 (1877).

The most difficult question on this branch of the subject, namely, how specific the reference to the unsigned paper must be, and how far parol evidence is admissible to explain and limit a general reference, has received much attention in the last few years from the courts both of England and of this country. As a result of the most recent decisions, it would seem that. provided it appear in the signed writing that some other paper is referred to, parol evidence is admissible to apply the general reference to the particular paper. Thus in the recent case of Beckwith v. Talbot, 95 U.S. 289 (1877), the unsigned paper was referred to as "the agreement," and this was held to be a sufficient reference. Mr. Justice Bradley, in his opinion, says: "It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." So in Smith v. Colby, 136 Mass. 562 (1884), the words in a letter "We will undertake the croquet job upon the terms agreed upon when at your place," were held to contain a sufficiently specific reference to a written agreement signed by the plaintiff, but not signed by the defendant. But see the opinion of Doe, C. J., in Brown v. Whipple, 58 N. H. 229, in

which the language of Mr. Justice Bradley, supra, is criticised. In a late English case, Long v. Millar, 4 C. P. D. 450 Thesiger, L. J., would seem to have squarely accepted as law the proposition that where it appears by the signed writing that some other writing is referred to, parol evidence is always admissible to identify that writing. He says: "When it is proposed to prove the existence of a contract of several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence." The other late English cases would seem to be in accord; Ridgway Wharton, 6 H. L. Cas. 238; Baumann v. James, 3 Ch. App. 508; Pierce v. Corf, L. R. 9 Q. B. 210; Rishton v. Whatmore, 8 Ch. D. 467; Shardlow v. Cotterell, 20 Ch. D. 90 (1881); Kronheim v. Johnson, 7 Ch. D. 60; Cave v. Hastings, 7 Q. B. D. 125; Craig v. Elliott, 15 L. R. Ir. 257 (1884); Studds v. Watson, 28 Ch. D. 305 (1884); Wylson r. Dunn, 34 Ch. D. 569 (1887). For the latest American law on the subject, see Western Union Tel. Co. v. R. R. Co., 86 Ill. 246; Boston & Albany R. R. Co. v. Richardson, 135 Mass. 473; Doherty v. Hill, 144 Mass. 465 (1887); District of Columbia v. Johnson, 1 Mackey (D. C.) 51 (1881); Moses v. McClain, 82 Ala. 370 (1886); Oliver r. Ala. Gold Life Insu. Co., Id., 417; Peel. r. Vandemark, 99 N. Y. 29 (1885); North v. Mendel, 73 Ga. 400 (1884); Bosckeln r. McGowan, 12 Mo. App. 507 (1882); Tice r. Freeman, 30 Min. 389 (1883); Smith r. Jones, 66 Ga. 338 (1881).

Papers physically connected at the time of signing may be read together, and it is immaterial that they subsequently become severed; Kenworthy v. Schofield, 2 B. & C. 945, per Holroyd, J.; Tallman v. Franklin, 14 N. Y. 584.

The signature.— The statute not only requires a writing, but requires also that the writing should be signed by the party to be charged, or his agent thereunto lawfully authorized. The courts have interpreted the word "signed" as employed in the statute in contradistinction to the word "subscribed." "If this were the first case on the Statute of Frands, I should have doubted whether, if the vendee put his name at the top of the document, this would have been a signing within the statutes. But it has been decided that it does not signify where the name is put, if it be put somewhere on the document by the parties

themselves who are to be bound by the signature, or by the person having authority from them to make a contract on their behalf." Crompton, J., in Durrell v. Evans, 31 L. J. Ex. 337, decided in the Exchequer Chamber in 1862.

The law is well settled, accordingly, both in England and in this country, that the signature may be at the top or in the middle of the writing, as well as at the end. So the signature may be by initials; Phillimore v. Barry, 1 Camp. 513; Sanborn v. Flagler, 9 Allen 474. And a printed signature will satisfy the statute; Schneider v. Norris, 2 M. & S. 286; Drury v. Young, 58 Md. 546 (1882). The written or printed name, however, wherever it is placed in the document, must be intended to authenticate it. It is always a question for the jury, whether the defendant adopted the printed signature pro hac vice and whether he intended to be bound by the writing as it stood, or whether it was left unsigned at the foot because he refused to complete it. Thus in Johnson v. Dodgson, 2 M. & W. 653, the memorandum was drawn up by the defendant in his own handwriting, "Sold John Dodgson, etc.," and signed at the foot by the plaintiff only, but remained in the possession of the defendant. It was held by the court, that under these circumstances, it was plain that the defendant intended to be bound by his signature at the top of the memorandum. So in Schneider v. Norris, 2 M. & S. 286, where the seller filled up the blank in a printed bill of parcels, with the name of the purchaser, and afterwards delivered it to him, it was held that this was a sufficient adoption of the seller's name printed at the top. So in a recent Mayland decision, Drury v. Young, 58 Md. 546 (1882), an instructive case upon this branch of the subject, the only signature was the following letter-head, "Office of Drury, Ijams & Rankin, wholesale and retail grocers, etc.," and the court were inclined to hold that this would be a sufficient signature if brought home to the defendant, although the writing remained in his possession and was not signed by the plaintiff. But in Boardman v. Spooner, 13 Allen 353, where the purchaser stamped his name and a date on the bill of parcels, without delivering it to the seller, in the absence of evidence to show that he had adopted such a stamp as a signature, and had affixed it to the instrument with the intent to bind himself thereby, it was held that there was no memorandum properly signed under the statute. See, also, in general, Saunderson v. Jackson, 2 B. & P. 238; Sarl v. Bourdillon, 26 L. J. C. P. 784
Kronheim v. Johnson, 7 Ch. D. 60; Caton v. Caton, L. R. 2 H.
L. 127; Jones v. Victoru Graving Dock Co., 2 Q. B. D. 314;
Bennett v. Brumfitt, L. R. 3 C. P. 28; Hawkosworth v. Chaffey,
54 L. J. Ch. 72 (1886); Clason v. Bailey, 14 Johns. 484;
Penniman v. Hartshorn, 13 Mass. 87; Ulen v. Kittredge, 7
Mass. 233; Hodgkins v. Bond, 1 N. H. 287; Hawkons v. Chare,
19 Pick. 505; Sanborn v. Sanborn, 7 Gray 142; Hayard v. Day,
14 Allen 487.

Under the New York statute, which requires the memorandum to be subscribed, it is held that actual subscription is necessary: Davis v. Shields, 26 Wend, 341; McGiyern v. Flemming, 12 Daly (N. Y.) 289 (1884).

In Selby r, Selby, 3 Meriv, 2, it was held by Sir William Grant, that a letter signed "your affectionate mother," contained no sufficient signature within the intent of the statute; and see Skelton r, Cole, 1 De G, & J, 587. These cases have been somewhat severely criticised as putting too narrow a construction upon the statute, and, as has been said, it is hard to distinguish between initials and any other description of his identity which may be adopted by the signer of a paper.

Authority to affix signature.—Excepting in those states, like New Hampshire, where the authority of the agent is expressly required to be in writing, a parol authority is sufficient; and a subsequent ratification is equivalent to a prior authority; Soames v. Spencer, 1 Dowl. & R. 32; McLean v. Dunn, 4 Bing. 722; Davis v. Shields, 24 Wend, 324; Eggleston v. Wagner, 46 Mich. 610 (1881); Hawkins v. Baker, 46 N. Y. 666.

An agent authorized to make in behalf of his principal a contract within the Statute of Frands, has also an authority by implication to bind him by a note or memorandum; and even after the termination of the agency, it seems that the agent may still make and deliver to the other contracting party a memorandum binding on his principal, unless his authority so to do has been expressly revoked; Williams v. Bacon, 2 Gray 387, per Merrick, J.; Elliot v. Barrett, 144 Mass. 256 (1887). But see Smith v. Arnold, 5 Mas. (C. C.) 414. See infra as to auctioneers. It is of course unnecessary that the agent's name should appear in the memorandum; Hunter v. Giddings, 97 Mass. 41. See infra as to the necessity of the principal's name appearing.

An agent cannot delegate his authority to make a memorandum, unless so empowered by his principal; Townsend v. Drakeford, 1 C. & K. 20; Henderson v. Barnewall, 1 Y. & J. 387. But see *infra* as to auctioneers' clerks.

It is well established that neither of the contracting parties can be the agent of the other for the purpose of making and signing a valid memorandum within the Statute of Frauds; Wright v. Dannah, 2 Camp. 203; Bird v. Boulter, 4 B. & Ad. 443; Farebrother v. Simmons, 5 B. & Ald. 333; Sharman v. Brandt, L. R. 6 Q. B. 720; Murphy v. Boise, L. R. 10 Ex. 126; Robinson v. Garth, 6 Ala. 204. But see Ennis v. Walker, 3 Blackf. 472; Johnson v. Buck, 35 N. J. L. 338. But the agent of one party may, if expressly so authorized, sign the memorandum in behalf of the other party; Graham v. Muson, 5 Bing. N. C. 603; Graham v. Fretwell, 3 M. & G. 368; Simmons v. Humble, 13 C. B. N. S. 258. And see Bamber v. Savage, 52 Wis. 110 (1881).

Entries by auctioneers.—A common application of this principle is the authority of an auctioneer, who is, strictly speaking, the agent of the seller, to bind the purchaser as well as the seller by entries in his books or by other writings; Hinde v. Whitehouse, 7 East 558; Morton v. Dean, 13 Met. 385; Gill v. Bicknell, 2 Cush. 355, per Shaw, C. J.; Springer v. Kleinsorge, 83 Mo. 152 (1884). On the principle laid down supra, the auctioneer cannot himself sue on a contract within the statute evidenced by a memorandum made by himself; Farebrother v. Simmons, supra; Rayner v. Linthorne, 2 C. & P. 124; Smith v. Arnold, 5 Mas. (C. C.) 417; Bent v. Cobb, 9 Gray 397; Brent v. Green, 6 Leigh 16; and see cases cited supra.

Auctioneers differ from other agents in that their memoranda must be made at the time of the sale, at least in order to bind the purchaser; Buckmaster v. Harrop, 13 Ves. 456; Mews v. Carr, 1 H. & N. 484; Smith v. Arnold, supra; Horton v. McCarty, 53 Me. 394; Williams v. Bacon, 2 Gray 387; Bamber v. Savage, 52 Wis. 111 (1881); Hewes v. Taylor, 70 Penn. St. 387. In a recent Massachusetts case, Marcus v. Boston, 136 Mass. 350 (1884), it was held that a bill in equity could not be maintained which was brought by a person claiming to be the highest bidder at an auction sale of land, against the auctioneer and the person to whom the land was struck off, and the memorandum of sale executed.

to compel the auctioneer to sign a memorandum of sale declaring the plaintiff to be the purchaser.

There is great diversity among the reported cases as to whether an auctioneer can delegate his authority to sign a memorandum to his clerk, but it would seem by the weight of authority that he can so delegate it; Cohes v. Trecothick, 9 Ves. 234; Bird v. Boulter, 4 B. & Ad. 443; Henderson v. Barnewall, 1 Y. & J. 387; Gill v. Bicknell, 2 Cush. 355; Frost v. Hill, 3 Wend. 386; Doty v. Wilder, 15 Ill, 407; Alma v. Plummer, 4 Greenl, 258; Hart v. Woods, 7 Blackf, 568. But see Pierce v. Corf, L. R. 9 Q. B. 210; Meadows v. Meadows, 3 McCord (S. C.) Law 458; Christie v. Simpson, 1 Rich, (S. C.) Law 407 contrat.

By the great weight of authority, in the case of an auctioneer, as of other agents, his actual signature is unnecessary. It is enough if the memorandum contain the names of the pinchaser and seller, together with all the essential terms of the contract, and it is immittered if his own name does not appear in the writing; Morton v. Dean, 13 Met. 385; Fessenden v. Massey, 11 Cush. 127; Coddington v. Goddard, 16 Gray 436; Merritt v. Clason, 12 Johns. 102; Springer v. Kleinsorge, 83 Mo. 152 (1884). But see Rafferty v. Lougee, 63 N. H. 54 (1884) contra.

Brokers' entries, bought and sold notes. - A broker, like an auctioneer, is the agent of both parties, and both are bound by his memorandum. In this country it is well established law that the entries in a broker's books constitute a good memorandum within the statute, and in England the better opinion would now seem to be to the same effect, although in the past there has been among the English judges a great diversity of views upon the subject; Maclean v. Dunn, 4 Bing, 722; Thornton v. Charles, 9 M. & W. 802; Thom; son v. Gardiner, 1 C. P. D. 777; Merritt v. Clason, 12 Johns. 102; Davis v. Shields, 26 Wend. 341; Boardman v. Spooner, 13 Allen 353; Coddington v. Goddard, 16 Gray 436. In England the law seems to be that the broker's entry must be signed by him, and that his own name must appear; Grant c. Fletcher, 5 B. & C. 436; Gorm v. Aflalo, 6 B. & C. 117; Henderson v. Barnewall, 1 Y. & J. 387; while in this country it seems to be assumed that the same principle applies as in the case of auctioneers' entries. See cases cited supra.

The bought and sold notes of a broker, if they correspond with one another, are held to be a sufficient memorandum within the statute; Hawes v. Foster, 1 M. & R. 368; Parton v. Crofts, 33 L. J. C. P. 189; Suydam v. Clark, 2 Sandf. 133; Heffron v. Armsby, 61 Mich. 505 (1886); Greeley-Burnham Co. v. Capen, 23 Mo. App. 301 (1886); and in Langdell's Cases on Sales (Index, pp. 1035, 1036) the author argues with much force of reasoning that even a disagreement in the notes should not prevent a recovery, provided the note sued on contains all the stipulations of the verbal agreement. See Thompson v. Gardiner, supra; Newberry v. Wall, 84 N. Y. 576; Butler v. Thompson, 92 U.S. 412. It has been decided in England that if the bought and sold notes disagree, resort may be had to the broker's entry as containing the true stipulations of the contract; Sievewright v. Archibald, 17 Q. B. 103. But the important question as to which is to be considered the memorandum, the broker's entry or the bought and sold notes, when the latter agree with each other but disagree with the entry, seems to be still undecided. See Langdell's Cases on Sales, cited supra.

III. Contents of memorandum. In general. — A memorandum within the statute, of whatever description, and whether contained in one writing or in many, must correspond with the previous verbal agreement. If stipulations are added in the writing which were not contained in the verbal agreement, or if any essential stipulations of the original contract are omitted, the memorandum is defective. "Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent." Mr. Justice Clifford, in Williams v. Morris, 95 U. S. 444. Thus in Seaman v. Drake, 97 N. Y. 230 (1884), a memorandum of a contract of employment for more than a year was held to be insufficient because no mention was made therein of the nature of the employment. So in Webster v. Clark, 60 N. H. 36 (1880), a memorandum of a contract for a lease of real estate, "buildings to be erected by the lessor," was held defective, because the writing did not specify the kind of buildings. So the memorandum of such a contract must specify the exact day when the term is to begin. Marshall a Berridge, 19 Ch. D. 233; May v. Thompson, 20 Ch. D. 705 (1882); Phelan v. Tedeastle, 15 L. R. Ir. 169; White v. McMahon, 18 L. R. Ir. 400. So in May v. Ward, 134 Mass. 127 (1883), where an essential element of the contract was left to be agreed upon at some time in the future, the writing was held insufficient. So in Asheroft v. Butterworth, 136 Mass, 511 (1884), where the memorandum was, "We will supply you with gauge glass at the same rate we supply A.." it was held that this was not explicit enough to satisfy the statute. See infra as to the price. So if goods are sold "subject to the buyer's approval," that condition must appear in the memorandum; Boardman v. Spooner, 13 Allen 353. See, also, in general, M'Lean v. Nicoll, 7 Jur. N. S. 999; Rishton v. Whatmore, 8 Ch. D. 467; Vincent r. Vincent, 55 L. J. Ch. D. 181 (1886); Grace v. Dennison, 114 Mass. 16; Pitz v. Coney, 118 Mass, 100; Gardner v. Hazilton, 121 Mass, 494; Remick v. Sandford, 118 Mass. 102; Newborry v. Wall, 65 N. Y. 484; Ullman v. Meyer, 10 Abb. (N. Y.) N. C. 281 (1882); McWillliams r. Lawless, 15 Neb. 131 (1883); Eppach r. Clifford, 6 Col. 493; Rafferty v. Lougee, 63 N. H. 54 (1884).

Parties.—By an almost unbroken current of decisions it is held that the names of the contracting parties must appear in the memorandum; Champion v. Plummer, I. N. R. 252; Klinitz v. Surry, 5 Esp. 267; Williams v. Byrnes, 9 Jur. N. S. 363; Anderson v. Harold, 10 Ohio 399; Calkins v. Falk, 38 How. Pr. R. 62; McElroy v. Leery, 61 Md. 397 (1883); Hawkinson v. Harmon, 69 Wis. 551 (1886); Lincoln v. Eric Preserving Co., 132 Mass. 129 (1882). So it has been held that a memorandum of a contract of guaranty must contain the name of the creditor; Williams v. Lake, 2 El. & E. 349.

It would seem that a memorandum of a contract of sale must show who is the buyer and who is the seller; Bailey v. Ogden, 3 Johns. 399. See the dissenting opinion of Mr. Justice Curtis, in Salmon Falls Manf. Co. v. Goddard, 14 How. 446; but the courts have generally been disinclined to reject parol evidence introduced for the purpose of explaining the relationship of the parties; Newell v. Radford, L. R. 3 C. P. 52; Salmon Falls Manf. Co. v. Goddard, supra; Coddington v. Goddard, 16 Gray 436; Sanborn v. Flagler, 9 Allen 474.

It would seem that the parties to the contract must be re-

ferred to in the memorandum quà contracting parties. Thus in Vanderbergh v. Spooner, L. R. 1 Ex. 316, the following memorandum was held defective: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vanderbergh, etc." So by a recent decision in the U. S. Supreme Court it was determined in the case of an auctioneer's memorandum that a reference to the seller, not as seller, but as a person of whom information about the property could be obtained, was faulty; Grafton v. Cummings, 99 U. S. 100 (1878).

In Sale v. Lambert, L. R. 18 Eq. 1, it was held that a description of the seller as "the proprietor" was a sufficient reference, although the seller's name was not mentioned. See, also, Commins v. Scott, L. R. 20 Eq. 11. But a reference to him as "the vendor," is held insufficient; Potter v. Duffield, L. R. 18 Eq. 4. See, also, Rossiter v. Miller, 3 App. Cas. 1124; Jarrett v. Hunter, 34 Ch. D. 182 (1886); Re Hudson, 54 L. J. Ch. 811 (1885). Compare Jones v. Dow, 142 Mass. 130 (1886).

The decisions are uniformly to the effect that in a memorandum signed by an agent, the principal's name need not appear; Kenworthy v. Scofield, 2 B. & C. 945; Williams v. Bacon, 2 Gray 387; McWilliams v. Lawless, 15 Neb. 131 (1883); Conaway v. Sweeney, 24 W. Va. 643 (1884); Neaves v. Mining Co., 90 N. C. 412. This doctrine, somewhat questionable on principle, the courts have refused to extend to the case of an auctioneer's memorandum. It is held, accordingly, that his signature will not supply the place of a reference to the name of even the seller; Potter v. Duffield, supra; Sherburne v. Shaw, 1 N. H. 157; Grafton v. Cummings, supra.

Price.—In a contract of sale it is held that the price, if agreed upon by the parties, is one of the essential terms of the contract, and must be contained in the memorandum; and the same rule prevails even in those jurisdictions where it is provided by statute that the consideration need not be expressed in the memorandum; Acebal v. Levy, 10 Bing. 376; Elmore v. Kingscote, 5 B. & C. 583; Smith v. Arnold, 5 Mas. (C. C.) 416; Soles v. Hickman, 20 Penn. St. 180; O'Neill v. Crane, 67 Mo. 250; Williams v. Morris, 95 U. S. 444; Ascroft v. Butterworth, 136 Mass. 511 (1884); Phelps v. Stillings, 60 N. H. 505 (1881). So in a receipt for part payment of the price of real estate it would seem that the full price agreed upon must be stated; Phillips v. Adams, 70 Ala. 373 (1881); Wright v.

Mischo, 52 N. Y. Super. Ct. 241 (1885). But see Thombury v. Masten, 88 N. C. 293 (1886); Ellis v. Bray, 79 Mo. 227 (1883), contra. If no price be agreed upon by the partie, none, of course, need be stated in the memorandum; Hoadly v. McLane, 10 Bing. 482; Asherott v. Morrin, 4 M. & G. 450; Argus Co. v. Albany, 55 N. Y. 495; Norton v. Gale, 95 Ill. 538. But see James v. Muir, 33 Mich. 224.

Credit.—If a sale is made on credit the terms of the credit must be stated in the memorandum; Wright v. Weeks, 25 N. Y. 158; Norris v. Blair, 39 Ind. 90; Williams v. Robinson, 73 Me. 186; Schroede v. Taabe, 11 Mo. App. 267 (1881); Gault v. Stormont, 51 Mich. 636 (1883). It would seem that if nothing is said as to the time of payment, the memorandum may be silent on the subject, since it will be presumed to be a eash transaction; Hawkins v. Chace, 19 Pick. 502. But see the language of Mr. Justice Curtis in Salmon Falls Manf. Co. v. Goddard, 14 How. 446.

warranty. It was decided in an early New York case that if goods are sold with an express warranty it must be so stated in the memorandum; Peltier v. Collins, 3 Wend. 459. But it would seem that this must depend upon whether the warranty is intended by the parties as a condition of the sale or as an independent agreement.

Time and place of delivery.—A memorandum of a contract for the sale of goods within the statute must state the time and place of delivery, if agreed upon by the parties; otherwise not; Hawkins v. Chace, 19 Pick, 502; Kriete v. Myer, 61 Md. 558; Smith v. Shell, 82 Mo. 215 (1884); Greeley-Burnham Co. v. Capen, 23 Mo. App. 301 (1886).

Description of subject-matter. There have been many cases in the last few years with reference to the adequacy of the description of the subject-matter contained in the memorandum. The later tendency seems to be, as in the case of the incorporation of unsigned papers referred to in the signed writing, in the direction of admitting the introduction of parol evidence in order to establish the identity of the subject-matter. There is, however, considerable conflict among the decisions as to how specific a description the memorandum must contain. In a recent Michigan case, the court say in reference to the sufficiency of the description in a memorandum of the sale of real estate: "The degree of certainty with which the premises must

be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are not all harmonious. But they agree in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject-matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description, without being contradicted or added to, can be connected with, and applied to, the very property intended, and to the exclusion of all other property." Eggleston v. Wagner, 46 Mich. 610 (1881). Thus in Hurley v. Brown, 98 Mass. 545, it was held that the words, "A lot of land situated on Unity Street, Lynn, Mass.," was a sufficient description, and that parol evidence was admissible to show which lot of land on the street belonged to the vendor. See, also, Scanlan v. Geddes, 112 Mass. 15; Slater v. Smith, 117 Mass. 96; Mead v. Parker, 115 Mass. 413; Mansfield v. Hodgdon, S. C. Mass. June 1888. In Mead v. Parker, there was no mention in the body of the writing of the town in which the property was situated, but it was held that it was presumed to be situated in the town at which the writing was dated. Doherty v. Hill, 144 Mass. 465 (1887), it was held that such a description was insufficient if it appeared in evidence that the vendor owned more than one lot of land on the street mentioned in the memorandum. The language of Mr. Justice Holmes in this case, is especially instructive. "The plaintiff argues that there is an ambiguity introduced by parol, and that, therefore, it may be removed by parol. But the statement seems to us misleading. The words show on their face that they may be applicable to one estate only, or to more than one. If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case, the words used must be translated into things and facts by parol evidence. But if when so translated, they do not identify the estate intended, as the only one which would satisfy the description, they do not satisfy the statute." If, accordingly, it is impossible to identify the subject-matter by parol evidence, the memorandum is insufficient. Oral evidence could not of course be admitted to show the original intention of the parties, when

undisclosed by the writing, since this would plainly be adding to the memorandum, and a maintest violation of the statute Thus the words "a piece of land," without more, is a too hidelenite description; Whelan e. Sullivan, 102 Mass. 204. So the following descriptions are insufficient for the same teason: "Thirty acres of land," Humbert c. Brisbane, 258, C. 506 (1886); "Your house," Whaley v. Hindhman, 22 Mo. App. 483 (1886) See, also, to the same offect, Sanborn v. Nordan, 20 Min. 162; Tice v. Freeman, 30 Min. 389 (1883); Fry v. Platt. 32 Kans. 62 (1884); Pierson v. Ballard, 32 Min. 263 (1884); Schroede v. Taube, 11 Mo. App. 217 (1881). But "the Snow farm" is a sufficient description; Hollis v. Burgess, 37 Kins. 187 (1887). So wall of section 36 in township 15," Vindguest v. Perky, 16 Neb. 284. So "title or claim to property bought of A. & B., and known as the Gentile property," Smith a Freeman, 75 Ala. 285 (1885). For other examples of a sufficient description, see Penniman v. Hartshorn, L. Mass. 87: Barry v. Coumbe, 1 Pet. 640; Gowen v. Klous, 101 Mass. 449; Bishop v. Fletcher, 48 Mich. 555 (1882); Thornbury J. Masten, 88 N. C. 293 (1883); Pul v. Miller, 81 Ind. 190; Fisher v. Kulm, 54 Miss. 481. In Clark c. Chamberlin, 112 Mass, 19, it was held that a description of certain lots by number, without reference to any plan, was insufficient. But see Springer v. Kleusorge, 83 Mo. 152 (1884) contra.

In England the law would seem to be even more liberal than in this country in allowing external evulence to be introduced for the purpose of identifying the subject-matter. The following have been held a sufficient description: "my house," Cowley v. Watts, 17 Jur. 172; "the property in Cable Street," Bleakley v. Smith, 11 Sim. 150; "the house in Newport," 3 M. & K. 353; "the intended new public house at Putney," Wood v. Scarth, 2 K. & J. 33; "the premises," ibid.; "the Jolly Sailors' offices," Naylor v. Goodall, 47 L. J. Ch. 53; "this place," Waldron v. Jacob, 5 Ir. R. Eq. 131; "property purchased at Sun Inn, Pinxton, on 29th March," Shardlow v. Cotterell, 20 Ch. D. 90. See, also, M'Murray v. Spicer, L. R. 5 Eq. 527; Ex parte Nat. Prov. Bank., 4 Ch. D. 241; Nene Valley Drainage Commissioners v. Dunkley, 4 Ch. D. 1.

The consideration.—In Wain r. Warlters, principal case, it was decided that in the memorandum of contracts within the fourth section of the statute the consideration must be ex-

pressed. This decision was followed in Saunders v. Wakefield, 4 B. & Ald. 595. In Egerton v. Mathews, 6 East 307, the court distinguished between the word "agreement" in the fourth section and the words "contract" and "bargain" employed in the seventeenth section of the statute, expressing the opinion that under the latter section the consideration of the contract need not be expressed in the memorandum. But see supra as to the price. In the year 1856 it was enacted by parliament that the consideration of a contract of guaranty need not be expressed in the memorandum. In this country the whole subject is largely regulated by acts of the legislatures of the several states; in many cases these acts being simply declaratory of the law as laid down by the court of last resort, and in other cases changing the law. See Packard v. Richardson, 17 Mass. 112; Kerr v. Shaw, 13 Johns. 236; Patchin v. Swift, 21 Vt. 292; Gillighan v. Boardman, 29 Me. 79; Reed v. Evans, 17 Ohio 128; Hutton v. Patchin, 26 Md. 228; Goodnow v. Bond, 59 N. H. 150 (1879); Sanders v. Barlow, 21 Fed. Rep. 836 (1884).

In the state of New York at the present time the law on this subject seems to be in a state of great uncertainty. It was early decided by the courts of that state that the consideration must be denoted in the writing. A declaratory statute was afterwards passed, and in 1863 this statute was repealed. The effect of the repeal of this statute seems to be still undecided. In Castle v. Beardsley, 10 Hun 343, and Speyers v. Lambert, 16 Abb. Pr. N. S. 309, opposite views are adopted. For an elaborate discussion of the present New York law see Drake v. Seaman, 97 N. Y. 230 (1884). See, also, Evansville Nat. Bank v. Kaufman, 93 N. Y. 273.

Both in England and in this country it has always been held that a general reference to the consideration is sufficient and that it may be inferred by implication; Stadt v. Sill, 9 East 348; Ryde v. Curtis, 8 D. & R. 62; Pace v. Marsh, 1 Bing. 216; Haigh v. Brooks, 10 Ad. & E. 309; Leonard v. Vredenburgh, 8 Johns. 40; Church v. Brown, 21 N. Y. 315; Williams v. Ketchum, 19 Wis. 231; Miller v. Cook, 23 N. Y. 495.

IV. Alteration of contracts within the statute by parol.—It is well established law that those written contracts to which the Statute of Frauds has no application may be subsequently, at any time before breach, altered or varied in their terms,

or absolutely rescinded, by a verbal agreement between the parties; Goss v. Lord Nugent, 5 B. & Ad. 65, per Denman, C. J. If the contract is within the statute it would soom that all modifications of such a written contract must themselves be in writing. There is considerable conflict, however, among the earlier English cases on the subject, and the law of Lingland and of Massachusetts is entirely at variance. On one point, however, there is no disagreement, namely, that the plaintiff must declare upon the written agreement, and not upon the writing and the parol modification together; Goss v. Lord Nugent, supra; Stead v. Dauber, 10 Ad & El 57; Whittier v. Dana, 10 Allen 326. This would seem to have been the true ground of decision in Marshall v Lynn, 6 M & W 109. See Hickman v. Haynes, L. R. 10 C. P. 598 But in Cummings v. Arnold, 3 Met 486, and Steams v. Hall, 9 Cush 31, it was held that a written contract within the statute might be modified by parol, and that a readiness to perform the substituted contract would avail either the plaintiff or the defendant to excuse the non-performance of the original agreement. In England, on the other hand, it is hold that an actual performance of the substituted contract and acceptance thereof is necessary, which will operate by way of accord and satisfaction of any breach of the written agreement; Parke, B, in Moore v. Campbell, 10 Ex. 323; Leather Cloth Co. r. Hieronimus, L. R. 10 Q. B. 140. See Long v. Hartwell, 34 N. J. L. 116, accord.

In Hickman v. Haynes, L. R. 10 C. P. 598, Lindley, J., says: "The result of the cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds." But in this case the law is stated to be that either the plaintiff or defendant is excused from the performance of the original contract, if the failure to perform was the result of the oral request of the other party, since the allegation of readiness to perform according to the terms of that contract can then be sustained. Such an oral modification, however, cannot avail the party at whose request the change was made. See, also, Cuff v. Penn, 1 M. & S. 21, a decision which on this principle would seem to have been in harmony with the other English cases; Stead v. Dauber, 10 Ad. & El. 57; Tyers v. Rosedale Iron Co., L. R. 10 Ex. 195; Plevins v. Downing, 1

C. P. D. 220; Stewart v. Eddowes, L. R. 9 C. P. 311; Ogle v. Lord Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; Saunderson v. Graves, L. R. 10 Ex. 234. See, also, Stryker v. Vanderbilt, 27 N. J. L. 68, 75; Blood v. Goodrich, 9 Wend. 68; Ladd v. King, 1 R. I. 224; Hill v. Blake, 97 N. Y. 216 (1884); Barton v. Gray, 57 Mich. 622, 632 (1885); Alta v. Bartholomew, 69 Wis. 43 (1887) accord. See, however, Blanchard v. Trim, 38 N. Y. 227; Organ v. Stewart, 60 N. Y. 413, 419; Swain v. Seamens, 9 Wall. 254, 277, which seem to favor the less stringent rule prevailing in Massachusetts.

It was decided in England, soon after the passage of the statute, that a written contract which fell within its provisions could be rescinded by parol; Gorman v. Salisbury, 1 Vern. 240. See, also, Norton v. Simons, 124 Mass. 19. In Noble v. Ward, L. R. 1 Ex. 117, in which this is assumed to be law, the important question arose as to whether a substituted oral agreement, invalid under the statute, had the effect of rescinding the original contract. See, also, Moore v. Campbell, 10 Ex. 323. In Noble v. Ward, it was held that such an invalid substituted agreement did not per se operate as a rescission of the original contract. The question would seem to depend upon the intention of the parties, whether or not the continuance of the original contract was meant to be contingent upon the validity of the verbal agreement, and this would appear to be a question of fact for the jury.

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MICHAS GEO : - IN THE KINGS BENCH

[40 PORTED 9 FAST, 72]

A creditor may insure the life of his debt is to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and executors were furnished with the means of payment by a third party. (But see Dalby x. India & London Life Insurance Co., set out, infra, p. 297, contra.)

This was an action of debt on a policy of insurance made the 29th of Nov. 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in Long Acre, being interested in the life of the Right Hon. William Pitt, and desirous of making an insurance thereon for seven years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c., and having paid the premium of 15l. 15s, as a consideration for the assurance of 500%, for one year from the 28th of Nov. 1803, it was agreed that in case Mr. Pitt should happen to die at any time within one year, &c., the funds of the company should be liable to pay and make good to the plaintiffs, their executors, &c., within three months after his demise should have been duly certified to the trustees, &c., the sum of 500%. And further that that policy might be continued in force from year to year until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 28th of Nov. in each year. The plaintiffs then averred, that at the time of making the said assurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of 15l. 15s. before the 28th of Nov. 1804, and the further sum of 15l. 15s. before the 28th of Nov. 1805; and that after that day, and while the assurance was in force, and before exhibiting the bill of the plaintiffs, viz., on the 23rd of Jan. 1806, Mr. Pitt died; that his demise was afterwards duly certified to the trustees, &c.; since when more than three months have elapsed before the commencement of this suit, &c.; but that the 5001. has not been paid or made good to the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiff's use, and upon an account stated. To this the defendant pleaded, 1st, nil debent. 2ndly, that the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, &c. 3rdly. As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain debt of 500l. at the time of making the policy due from Mr. Pitt to the plaintiffs, and no other; and that the said debt afterwards, and after the death of Mr. Pitt, and before the exhibiting of the plaintiff's bill, to wit, on the 6th of March, 1806, was fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt. Issues were taken on the first two pleas: and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other, replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and Lord Bishop of Lincoln, executors of Mr. Pitt, in manner and form as alleged, &c.: on which also issue was joined.

The defendants paid 31l. (a) into court upon the first count;

in respect of the premiums received; the grounds of computing which did not distinctly appear. The defend-

⁽a) There was some discussion in the course of the argument as to the sufficiency of the sum paid into court,

and on the trial of the cause before Lord *Ellenberough*, C. J., at Guildhall, it was agreed that a verdict should be entered on the several issues, according to the direction of the court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. Pht. mentioned in the policy, died on the 23rd of January, 1806; which event was duly certified in February, 1806, to the trustees of the Pelican Life Insurance Company. The detendants, before Trinity Term last, were served with process issued in this cause on the 3rd of June, 1806. Mr. Pitt was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death, above 5001, and died insolvent. On the 6th of March, 1806, the executors of Mr. Pitt paid to the plaintiffs, out of the money granted by Parliament for the payment of Mr. Pitt's debts, 1,1091, 11s. 6d., as in full for the debt due to them from Mr. Pitt. The case was argued in the last term by

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy notwithstanding the payment of the debt to them by Mr. Pitt's executors out of the money granted by Parliament for that purpose. It is clear that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the measure of that interest; and so far the existence and legality of the debt (a) is necessary to the validity of the insurance in point of interest under the stat. 14 Geo. 3, c. 48: but it is not the debt qua debt, which is insured, but the life of the debtor: it is only necessary that the interest should exist at the time of the insurance made, and continue up to the time of the death of the debtor, as it did in this case: and the sum insured having then become due, and the debtor's estate insolvent, the fact of payment of the debt afterwards by the third party cannot be material; such payment being gratuitous. The validity of the insurance depends upon its agreement with the stat. 14 Geo. 3, c. 48, which was made to prevent "insurances on lives or other

ants' counsel, however, denied the necessity of paying anything into court, the risk having once commenced; and ultimately no opinion was given by the court on this point.

⁽a) Dwyer v. Edie, London sittings after Hil. 1788. Park on Insur. 8th ed. 914; and 2 Marsh. on Insur. 3rd ed. 779.

events wherein the assured shall have no interest;" and for this purpose it enacts (s. 1) "that no insurance shall be made by any persons on the life of any person, &c., wherein the persons for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering;" and it avoids every assurance made contrary to the true intent and meaning thereof. The 2nd section prohibits the making any policy on the life of any person without inserting in it the person's name interested therein. And the 3rd section provides that in all cases where the insured hath interest in such life, &c., no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life, &c. Now here it cannot be disputed but that all the requisites of the act have been complied with. The only question which can be made is upon the third section, as to the necessity of the interest continuing beyond the time of the event happening on which the insurance is stipulated to be paid, and to the commencement of the action. But the interest need only continue up to the happening of the event insured, when the cause of action arises; and that is the usual averment in actions of this sort: and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid after Mr. Pitt's death, though before the action commenced. But if it had been necessary that the interest should endure up to the time of the action brought, that should have been averred: which has not been usual; and for want of which the judgments in former cases might have been arrested. The hazard was run for which the premium was received, during Mr. Pitt's life; and as he died insolvent, there was then as it were a total loss: then the underwriters' liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an interest in the policy: and it could not have been in the contemplation of the Legislature, when they granted the money for the payment of Mr. Pitt's debts, to adeem the risk of underwriters. In the case of insurances against fire, it never was conceived that the insurers could avail themselves pro tanto of charitable donations collected for the benefit of the sufferers. In the case of a life insurance, the premium is not calculated upon the risk of the insolvency of the person whose

life is insured, but solely on the probability of the duration of the life. But, if the defendant's objection be well founded, every case of this sort will be resolved into an examination of the assets: of which the insurers will avail themselves protanto, after having had the benefit of the whole premium; and this too, at any distance of time when assets may be forthcoming after the payment of the loss. But, secondly, by the payment of money into court the defendants admit a continuance of the plaintiff's interest in the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover something. And it does not appear how the premiums received have been reduced to the amount paid into court.

Marryat, contra, said that he should not now dispute the proposition, that a creditor might insure the life of his debtor since the statute; though it might have been doubted, at first, whether such an interest as that in the life of another were within the contemplation of the Legislature. There was an inception of the risk on the policy; and therefore the premium was properly paid; and no question can arise on the amount of it; this being an insurance on a precise sum, like a valued sea policy. The only question is, Whether, in the event, the plaintiffs have been damnified, and can call upon the assurers for any indemnification. To pursue the metaphor, the ship insured has been wrecked, but there has been a salvage, which the underwriters were entitled to, and out of which the assured have been indemnified; notwithstanding which, they still claim as for a total loss, contrary to the very nature of the insurance, which is only a contract of indemnity. Admitting that the general form of the declaration in these cases may have been such as is stated, still it is competent for the underwriters to show that a salvage has been received by the assured to the whole extent of their loss; and in no case can an assured recover double satisfaction, whether from the same or any other person; as in the case of a double insurance; and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of Bird v. Randall (a), where it was applied to a case much stronger than the present. For there a servant having entered into articles

⁽a) 3 Burr. 1345; 1 Blac. 373, 387.

to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this court, in an action by the master to recover damages against the seducer, held that the master's having before sued the servant, and recovered the penalty against him before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial), was a bar to such further remedy; considering the amount of the penalty as ample compensation for the injury received; and that no further satisfaction could be received from any other quarter. - (Lord Ellenborough, C. J. I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master; but there is the doubt, for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember, however, a similar case tried at the sittings in the Court of Common Pleas, before Mr. Justice Wilson, sitting for the Chief Justice, who ruled the same point upon the dry authority of the former decision: but, as it seemed to me at the time, with considerable doubt upon his mind as to the propriety of it. - Lawrence, J. I suppose the court proceeded upon the ground that the penalty was, by the express stipulation of the parties, made an equivalent for the loss of the service. — Lord Ellenborough. That is so as between the parties themselves; but it may admit of doubt, whether that were the fair way of considering it as against a stranger, a wrong-doer.) A voluntary payment of another's debt, if accepted as such, will protect the debtor: and if so, it will equally protect an insurer under the statute. For the object of that was to prevent wager policies; but if this policy may be enforced, notwithstanding payment of the debt, every creditor may gamble upon the life of his debtor by way of insurance, though without any reason to doubt of his solvency; and upon his death he would be entitled to double satisfaction of his debt. If a payment out of the debtor's assets would have been a bar to this action, it cannot enter into the merits of the case to inquire by whose assistance the executors have been

enabled to make the payment. The money was paid by them, and received by the plaintiffs, as for the *debt* of Mr. Pitt. Then, 2ndly, the payment of money into court on the first count only admits the contract declared on. It admits that the plaintiffs had an interest in the policy up to the death of Mr. Pitt, but not at the time of the action brought: and where a demand is illegal on the face of it, payment of money into court does not admit it (a). (It was afterwards stated by the court, and agreed on all hands, that the payment of money into court on the first count only admitted the *facts* stated in that count.)

Dampier, in reply, on the principal question, said that the facts of the case showed that this was not a wagering policy: but that the plaintiffs had an interest in it up to the extent of the sum insured. And he denied that the subsequent payment of the debt out of the grant of parliament was like the case of salvage on a marine policy; for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life. In Bird v. Randall (besides the doubt of the soundness of that decision), the penalty was considered as liquidated damages to the full extent of the injury: and the judgment recovered was considered as a satisfaction in law. If, in this case, the plaintiffs, after recovering judgment against the underwriters, had attempted to sue Mr. Pitt's executors, the cases would have been more alike. This stands as the case of a gratuitous payment by third persons of the debt of another, and not as the satisfaction of a legal demand, nor upon a stipulation to receive it as satisfaction of the present claim. It is most like the case of a charitable donation to sufferers by fire who were partially insured.

Curia adv. vult.

Lord Ellenborough, C. J., now delivered the judgment of the court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt for the sum of 500l. The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His lordship, after stating

⁽a) Cox v. Parry, 1 T. R. 464; and Ribbans v. Crickett, 1 B. & P. 264.

the pleadings and the case, proceeded—) This assurance, as every other to which the law gives effect (with the exceptions only which are contained in the 2nd and 3rd sections of the stat. 19 Geo. 2, c. 27), is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which had been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 Geo. 3, c. 48, s. 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interest of these individuals assured in the loss of their debt. The action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows, of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased; for though it were derived to them aliunde, the debt of the testator was equally satisfied by them thereout; and the damnifications of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord Mansfield in Hamilton v. Mendes, 2 Burr. 1210 (a). The words of Lord Mansfield are, "The plaintiff's demand is for an indemnity: his action then must be found upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event had decided that the damnification in truth is an average, or perhaps no loss at all." "Whatever undoes the damnifica-

⁽a) A case of Marine Insurance.

tion in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for *indemnity*, where, upon the whole event, no damage has been sustained."

Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of in lemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and thard pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.

(After having been treated as law, not only in this country, but in the United States, for a great number of years, during which it was frequently referred to by Judges of eminence without disapprobation, the case of Godsall v. Boldero has been overruled by the unanimous decision of six Judges sitting in the Exchequer Chamber, in the case of

Dalby v. The India and London Life Assurance Company.

[REPORTED 15 C. B. 365]

The Judgment was delivered December 2nd, [1854,] by Baron Parke, and the facts of the case, as well as the reasons upon which the decision proceeded, are fully stated. "This case," said his lordship, "now comes before as on a bill of exceptions to the ruling of my Brother Cresswell at Nisi Prius. We learn that on the trial he reserved the important point which arose in it for the consideration of the Court of Common Pleas; that when it came on for discussion it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal, and we have now, after a very able argument on both sides to dispose of it in this court of error. It is an action on what is usually termed a policy of life assurance, brought by the plaintiff, as a trustee for the Anchor Assurance Company, upon a policy for 1000%, on the life of his late Royal Highness the Duke of Cambridge. The Anchor Life Assurance Company had insured the duke's life in four separate policies-two for 1000/, and two for 500/, eachgranted by that company to a Mr. Wright. In consequence of a resolution of their directors, they determined to limit their insurances to 2000l. on one life; and this insurance exceeding it, they effected a policy with the defendants for 1000l. by way of counter-insurance. At the time the policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Mr. Wright, for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money, and of the delivering up the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot by the payment of the premiums till the duke's death. It may be conceded for the purpose of the present argument, that these transactions between Mr. Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected, and that at the time of the duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever. This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon. If the Court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion. There is the usual averment in the declaration, that at the time of the making of the policy, and thence until the death of the duke, the Anchor Assurance Company was interested in the life of the duke; and a plea that they were not interested 'modo et formâ,' which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. (Lush v. Russell, 5 Exch. 203.) We are all of opinion that it was sufficient, and but for the case of Godsall v. Boldero, 9 East, 72, should have felt no doubt upon the question. The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The

stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous dillnes) the same on the other. This species of insurance in new 19 per mbles a contract of indemnity. Policies of assurance against fire and against marine risks are both properly contracts of indemnity. the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured in their buildings, ships, and effects. Policies on maritime risks were aiturwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 G. 2, c. 37, and put an end to in all except a few cases; but at common law, before this statute with respect to maritime risks, and the 14 G. 3, c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies and wagers which were not contrary to the policy of the law were legal contracts; and so it is stated by the court in Cansins v. Nuntes (3 Taunt, 315), to have been solemnly determined in the case of Lucina v. Cranfurd (2 Bos, & P. 324, 2 N. R. 269), without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in The British Insurance Co. v. Mager (1 Cooke & Alc. 182), that the assurance was legal at common law. Their contract, therefore, in this case to pay a fixed sum of 1000l, on the death of the late Duke of Cambridge would have been unquestionably legal at common law, if the plaintiff had had an interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the stat. 14 G. 3, c. 48. This depends upon its true construction. The statute recites that the making insurances on lives and other events, wherein the insured shall have no interest, bath introduced a mischievous kind of gaming, and for the remedy thereof it enacts "that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy shall be made shall have no interest, or by way of gaming and wagering; and that every assurance made contrary to the true intent and meaning thereof, shall be null and void, to all intents and purposes whatsoever." As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke

of Cambridge, and that to the amount of 1000%, because they had bound themselves to pay a sum of 1000% to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provision in the act. The contract is good at common law, and certainly not avoided by the 1st section of the 14 G. 3, c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the 3rd clause; it is as follows: - "And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives, or other event or events." Now, what is the meaning of this provision? On the part of the plaintiff it is said it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a large amount, as it might if the 1st clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy; upon that value the assured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays, in the annuity for life, the fair value of the sum payable at death. If he misrepresents by overrating the value of the interests, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the policy, but that value he can recover. Thus the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the cestui que vie, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word 'hath' as referring to the time of effecting the policy. By the 1st section the assured is prohibited from effecting an insurance on a life, or on an event wherein he 'shall have' no interest - that is, at the time of assuring; and then the 3rd section requires that he shall recover only the interest

that he 'hath'; if he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3rd section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void; but the prohibition to recover or receive more than that amount obviates any difficulty on that head. On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value at the time of the death, or if payable at a time after death, when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute. and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then existing interest in the event of death, in consideration of a fixed annuity, calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of the death or the accrual of the cause of action, or the time of the verdict or execution, and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying, so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all. This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon the section. We should therefore have no hesitation, if the question were res integra, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy

it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself. The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract. But it is said that the case of Godsall v. Boldero, 9 East, 72, has concluded the question. Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought, and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes (2 Burr. 1270), that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it — a contract to pay a certain sum in the event of death; it is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the stat. 14 G. 3, c. 48. But though we are quite satisfied that the case of Godsall v. Boldero was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not and could not be questioned in a court of error, for one of the issues, nil debet, was found for the defendant. Since that case we know practically — and that circumstance is mentioned by some of the judges in the cases hereafter referred to - that the insurance offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interests to do so; they have, therefore, generally speaking, paid the amount of their life insurances, so that the number of cases in which it could be questioned is probably very small indeed; and it may be truly said, that instead of the decision in Godsall v. Boldero being uniformly acquiesced in and acted upon, it has been uniformly disregarded. Then as to the cases,

there is no case at law except that of Barbar's Morros (1 Moo. & R. 62), in which the case of Godsull v. Bolders was incidentally noticed as proving it to be necessary that the interest should continue till the death of the certai que che. It was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured without inquiry as to the existence of an insurable interest; and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover on the ground that the defendant, the yendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case; and though there was a dictum of Lord Tenter len that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case. The other cases cited on the argument in this case were cases in equity, where the propriety of the decision of Godsall v. Bol lero did not come in question. The questions arose as to the right of the creditor and debtor inter se, where the offices have paid the value of a policy, in Humphrey v. Arabin, 2 Lloyd & Goodd, 318; Henson v. Blackwell, 4 Hare, 434, cor. Sir J. Wigram, V. C.; Phillips v. Eastwood, 1 Lloyd and Goold (Cas. temp. Sugd.), 281where the point decided was, that a life policy, as a security for a debt, passed under a will bequeathing debts, the Lord Chancellor stating that the offices found it not for their benefit to act on the rigid rule of Godsall v. Boldero. In these cases the different judges concerned in them do not dispute, some indeed appear to approve of, the case of Godsall v. Boldero; but it was not material in any to controvert it, and the questions to be decided were quite independent of the authority of that case. We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case which itself could not be questioned by writ of error, and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry; and as in practice, it may be said that it has been constantly disregarded. Judgment reversed, and a venire de novo." -Judgment accordingly.

It will thus be seen that the point decided in Godsall v. Boldero has been distinctly overruled (a), and that the continu-

⁽a) [See also Law v. The Indisputable Life Policy Co., 24 Law J. Chan. 196, coram Wood, V. C.]

ance of any portion of the interest required by the statute when the policy is effected, is no longer necessary; as, however, the greater part of the following note is unaffected by this decision, it is preserved with such alterations as the present state of the law renders necessary.

Insurance, whether of ships, or against fire, is a contract of indemnity, and whenever an attempt is made to make it answer any other purpose, such an attempt tends to divert it from its original and legitimate object, which renders it the more extraordinary that contracts so plainly wresting it from its proper sphere as interest or no interest policies, should ever have been rec-

ognised by law.

That, however, they were so, is certain; though they were so far discouraged as inconsistent with sound principle, that, unless a policy was expressly stated to be made interest or no interest, it was understood that the insured was interested, and he was, in case of loss, bound to prove it. See Lucena v. Crawford, 3 B. & P. 101; Sadlers' Co. v. Badcock, 2 Atk. 556. In Ireland, where [until the passing of the 29 & 30 Vict. c. 42, applying to Ireland the provisions of the 14 G. 3, c. 48] there was no [similar] statute in force, interest or no interest policies on lives were valid, and where the policy was silent as to interest or no interest, the Court of Exchequer Chamber held that the declaration need not contain any distinct averment of interest. British Insurance Company v. Mayee, 1 Cooke & Alcock's Reports, 182.

However wager policies, as they are called, are now forbidden to be made on [British] ships, [or on profits on goods or effects laden on board (see Smith v. Reynolds, 1 H. & N. 221; De Mattos v. North, L. R. 3 Ex. 185; Berridge v. Man On Insurance Co., 18 Q. B. D. 346,)] by 19 G. 2, c. 37, and upon other matters by 14 G. 3, cap. 48, which enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any other person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering; and every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes."

By sect. 2, the name of the person interested therein, or for whose use, benefit, or on whose account the policy was made, is to be inserted in it. [The name must be inserted as that of the person interested; and no distinction is made in this respect by the statute between ordinary policies on lives and gaming or wagering policies. Hodson v. The Observer Assurance Co., 8 E. & B. 40.

By sect. 3, in all cases where the insured had an interest in the life or lives, event or events, no greater sum shall be recovered [or received from the insurer or insurers] than the value of that interest at the date of the policy.

[Hebdon v. West, 3 B. & S. 579.]

By sect. 4, marine insurances are exempted from the operation of this latter act; and as the act 19 G. 2, c. 37, which governs them, does not require the name of the person really interested to be inserted in a marine policy, it is not necessary that it should be so [except as provided by 28 Geo. 3, c. 56, which enacts that no policy shall be made on any ship or upon any goods, without inserting the name of one or more of the persons interested, or instead thereof of the consignor, consignee, or of the person who received or gave the order to effect the insurance.

This act does not extend to prevent individuals from effecting insurances upon the rown lives, provided that be done boot fibe. But it seems that a man would not be permitted to evade the statute by precuring one in whose life he had no legal interest to insure it with his money and for his benefit, though estensibly for the advantage of the party insuring. If to end by the Bland, I.M. & Rob. 181; I.M. & W. 32. Still it has been held that where a life policy is assigned, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration; for he stands upon the rights of the party who effected the insurance, and the statute only applies to the original parties to the policies, not to their assignees. Ashley v. Ashley, 3 Simons, 149.

The statute does not apply, as has been seen, merely to life policies, but to policies "on any other event or events whatsover." And so sweeping are these words, that it is perhaps not very easy to say precisely what description of wager, if reduced to writing, might not be invalidated by them. In *Ecological V. Homerton*, Cowp 737, (which was the first case decided on this statute), the defendant, in consideration of a certain sum, undertook to pay the plaintiff a greater sum, in case Minsone I. Chardier III on should at any time prove to be a female. At the trial the point was reserved, whether this wager was prohibited by st. 14 G. 3, cap 48, and the court held that it was so. It must be observed, that in this case the wager was drawn up in the form of a policy, and was indersed as one, and opened to any number of persons who pleased to subscribe.

In Faterson v. Foweil, 9 Bing, 320, the declaration was upon the following instrument:—

In consideration of forty guineas for 100/, and according to that rate, for every greater or less sum received of a consequence who were well and respective heirs. The executors, administrators, and assigns, and not one for the other or others of us, or for the heirs, executors, a.c., of the other or others of us, assume and promise, that we respectively, or our respective heirs, executors, a.c., shall pay or cause to be paid to the said and consequence, the sum or sums of money which we have hereunto respectively subscribed, without any abatement whatever; in case the Imperial Brazilian Mining shares be done at or above 1007, per share on or before the 31st day of December, 1829.

100/. James Powell, One hundred pounds,

29th April, 1829.

1007. Henry Hodges, do.

100l. A. P. Johnson do."

The court held this instrument void, as a policy prohibited by the statute. The Lord Chief Justice remarked, "that it had been contended that the words of the act were confined to cases where there was a subject-metter of insurance exposed to peril; but that that argument was inconsistent with the words any event or events whatsoever:" and his lordship cited, on that subject, the case of Mollison v. Staples, Park on Ins., 8th ed. 909, where a policy on the event of there being an open trade between Great Britain and Maryland on or before July 6, 1778, was held void by Lord Mansfield. "Our decision," continued his lordship, "therefore, must turn upon the provisions of the 14 G. 3, if this instrument can be deemed a policy. Upon that point we entertain no doubt. Here is a premium paid, in consideration of the insurers incurring

the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance—' We respectively will pay, or cause to be paid, to sum and sums of money which we have hereunto respectively subscribed, without any abatement whatever, in case,' &c. If the instrument in Roebuck v. Hamerton was rightly held to be a policy, I can make no just discrimination between that instrument and the present. It is true, that the policy contains no clause about average, because the circumstances of the risk do not require it. But, if the instrument can be deemed a policy without that clause, we should impair the efficacy of the act of parliament, if we were to consider it as an ordinary contract. I cannot consider it as other than a policy, and, if so, the plaintiff's claim must receive the same answer as was given by Lord Mansfield in Roebuck v. Hamerton; first, that this is an insurance on an event in which the party had no interest: or, if he had, the policy does not disclose the name of any party interested."

A contract by which an expected devise from a third person is assigned, in consideration of an advance of money to be repaid if the devise does not take place, does not amount to a wagering policy within the statute. See Cook v. Field, 15 Q. B. 460.]

On the other hand, it is too late to contend that there might not be many legal wagers, [although, as will be seen hereafter, the stat. 8 & 9 Vict. c. 109, s. 18, renders them, with certain exceptions, incapable of being enforced]. And there are instances in which the courts have refused to apply to such the provisions of the statute in question; thus, in Good v. Elliott, 3 T. R. 693, the action was upon a wager between the plaintiff and defendant, whether Susannah Tye had bought a certain waggon from David Coleman. The declaration stated the nature of the transaction; and, after verdict for the plaintiff, a rule nisi was obtained to arrest judgment, but was discharged by the court (dissentiente Buller, J.) after an elaborate discussion of the entire subject. The majority of the judges relied upon several decided cases, as proving that all wagers were not necessarily void at common law, but only those which, by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom; and they remarked, that had the law been otherwise, there would have been no occasion for passing stat. 14 G. 3, at all. They then proceeded to consider the question, whether the transaction was invalidated by that statute, and concluded that it was not.

"The statute," said Mr. J. Grose, "evidently meant that every insurance on lives, or on any event, in which the assured has not an interest, shall be void, whether such insurance be effected in the form of a policy, or by way of gaming or wagering. And if the construction contended for by the defendant be the true one, it leads to this extraordinary proposition, viz., that a statute which concerns every part of the community, and was passed in 1774, has never been understood by any one till 1790. To say that every wager is prohibited by this statute, is to say, that every wager is an insurance; and that the parliament meant to describe a wager by calling it an insurance; which I am of opinion was not their intent."

Lord Kenyon, in his judgment, further remarked, that it was apparent that the legislature had written instruments only in contemplation, by requiring the names of the parties interested to be inserted therein.

It will be observed, that the majority of the judges in Good v. Elliott, seem

to have considered the distinction between cases within and cases not within, the meaning of the statute, to consist rather in the atture of the risk than in the form provided it be written, of the contract. Indeed, the construction put upon the act by Grose, J., is irreconcileable with any other view, for his lordship, commenting on the statute, says, as is above cliud, "The statute meant, that every insurance on lives, or on any even, in which the assured had not an interest should be void, whether such insurance be effected to the form of a policy, or by way of gaming or wayering;" manifestly intending to express his opinion, that there were two ways of effecting an insurance, the one in the form of a pairty, the other having of given or a grant - that is in the form of a bet; but that, whichever way was adopted, the insurance would equally be void, if the insured had no interest in the subject-matter of insurance. And certainly that construction of the act appears rational; and there may be something not quite in accordance with common sense in saying that a statute prohibiting a contract can be evaded by shaping the contract in one form rather than another.

Now, if that construction of the statute be the true one, and if insurances be void, though in the form of wagers not of policies, the next question will be - what wapers are, in nature and in substance, howeverees, as contradistinquished from mere bets? and this question, too, seems to be answered by Mr. J. Grose, who, using the very words of the statute says, that it evidently intended insurances upon events. Now an event - that which will eventually happen comine, seems to include the uncertain uncertain, because future - issue of any transaction whatever. To give the word event used in the act, that sense, and to construe every wager on on cent to be a point, would have the effect of dividing all written way is into two classes: -1 Wagers upon questions capable of solution in prasenti - Wagers upon questions incapable of solution in prasenti, or coents. For instance, under the former class would fall a wager whether a particular horse is black or white, since the colour of the horse is an existing fact; under the second class, a wager, whether the foal a mare now goes with will be black or white, as that is a wager upon an event.

And if such really were the distinction between cases comprised and those not comprised by the statute, it would be a very thin one indeed; for, after all, if two men lay a bet upon a matter, the truth of which is presently ascertainable, although the thing either is or is not, as is asserted, and therefore its status cannot, with reference to the general nature of things, be an event, still, as the bettors are themselves uncertain how the truth will upon examination be discovered to be, their discovery of the true state of things is an event, although the thing discovered itself is not. And the distinction would indeed be a fine one, which should consist in the difference between a wager on a future thing, and a wager on the future discovery of an existing thing.

But, without adopting this distinction, it is impossible to escape from the conclusion, that the application of the act is to those written contracts only which are in the form of policies: or, to go a little further, that, if it do apply to any other contracts, it at all events applies only to such as are ordinarily, and in the common course of business, made by way of policy, though the parties may for the purpose of evading the statute, have framed them in the shape of wagers. That the class of cases comprehended within the latter part of the above proposition, should be within the provisions of the act, seems but reasonable. For the former part of the proposition there is great authority.

And first, there is authority to prove that all wagers, if conceived in the form

of policies, are within the statute. In Roebuck v. Hamerton, the wager was not upon an event, in the strict sense of that word; but on an existing, though unascertained fact, the sex of the Chevalier D'Eon. It is true that, in the other sense above suggested, treating the discovery as the event, it was on an event; for the words were "in case the Chevalier should at any time prove a female." But Lord Mansfield, although the distinction between existing facts and future events was taken at the bar, founded his judgment not on that distinction, but on the form of the contract. "The parties themselves," said his lordship, "have called it a policy. It is indorsed as a policy, opened as a policy, and any number of persons whatever might have subscribed it as such; therefore, it is clearly within the act."

In the case of Paterson v. Powell, cited at the beginning of the note, the court, as will be seen on reference to the extracts above made from the judgment of the Lord Chief Justice, relied particularly upon the form of the

contract, which was that of a policy.

On the other hand, it is clear, as has been said, from Good v. Elliott, that it is not every wager which is an insurance within the meaning of the act. In Good v. Elliott, the wager, it is true, was not upon an event; but we have seen already how thin the distinction is between a wager on a future circumstance, and a wager on the future discovery of a present but unknown one. In a case, however, in the Court of Queen's Bench, it has been held to make the difference between the legality and illegality of a bet on the result of a horse-race, Pugh v. Jenkins, 1 Q. B. 631.

In the case of Morgan v. Pebrer, 3 Bing. N. C. 457, the impression of the court appeared to be, that a wager on a future event, if not conceived in the shape of a policy, would not necessarily fall within the statute. It was an action of assumpsit; and the declaration stated that in consideration that the plaintiffs would, at the defendant's request, purchase 10,000l. of Cortes Bonds, and 30,000l. Spanish Scrip, the defendant promised to indemnify them against loss in a particular manner, which he had neglected to do. Plea, that the contract was for the purchase of public securities, to be delivered on a future day, and was in truth a wager on the price of Spanish securities, by which the plaintiffs, as brokers for the defendant, agreed with certain persons, that if the price of the said securities should be higher on a certain future day, the defendant should receive the difference; if lower, should pay the difference. Demurrer, on the argument of which it was decided, in accordance with Henderson v. Bise, 1 Stark. 158; Wells v. Porter, 2 Bing. N. C. 722; Oakley v. Rigby, ibid. 732; Elseworth v. Cole, 2 M. & W. 31; and Robson v. Fallows, 3 Bing. N. C. 392, that time-bargains in foreign securities were not void by the Stock-Jobbing Act, [the 7 Geo. 2, c. 8 (repealed by the 23 Vict. c. 28); and see now, since the 8 & 9 Vict. c. 109, Thacker v. Hardy, 4 Q. B. D. 685, cited infra.]

But, though that was the principal point, it was also submitted to the court by Mr. Gale, who argued for the defendant, that the contract was a gaming policy, void by the 14 G. 3, and Paterson v. Powell was cited. Upon this point the Lord Chief Justice said, "As to the statute 14 G. 3, c. 38, there is no case which has treated a simple wager as within the enactments against wagering policies on lives; and I cannot see how a simple wager, unobjectionable upon other grounds, can be said to fall within this statute, when it does not even assume the form of a policy of insurance." The observations of the rest of the court were equally strong, and it was expressly stated by Mr. J. Vaughan, that Lord Kenyon and Mr. J. Grose had both laid it down

" that the statute did not apply, except in the case where the wager assumed the shape of a policy of insurance."

It must, however, be observed on Morgan v. Peters, that it does not seem to have been necessary in that case to decide the point, whether a wager on a future event, not conceived in the usual shape of a policy, be within the meaning of the act or not. For it did not sufficiently appear from the record that the parties were not interested in the event. On the contrary, it rather appeared that they were so: for, though they were not possessed of the Spanish Stock, still, if a contract to buy foreign stock at a future day, or else pay the difference between its then and present price, was not illegal as a time-bargain within the Stock-Jobbing Act, then it is clear that the party making such a contract had an interest in the eventful price, and if so, the case [could not] fall within the 14 G. 3.

There is another ground on which this case may possibly be exempted from the operation of the statute. Lord Kenyon, it will be remembered, seemed to think that the act only applied to written contracts. Now there was no averment in any part of the record in Margan v. Primer, that any part of the contract there was in writing. Whether Lord Kenyon's dictum on that subject may be hereafter acquiesced in, is another question. Certainly it would be strange if a yaming policy, prohibited from being made in writing, could be good if made by pared: and the effect of that clause in the statute which directs that the name of the party interested shall be inserted, may perhaps be, not to render a policy good if verbal, which would be bad if written, but to render a writing necessary in every case. It should be observed that under the Stamp Acts it is necessary that policies should be in writing, see 35 Geo. 3, c. 63, now repealed; 30 Vict. c. 23, s. 7; 33 & 34 Vict. c. 97, ss. 117, 118.]

Notwithstanding the strong expressions used by the court in Morgan v. Pebrer, which, according to the well-known rule, must be referred to the case then before them, it is extremely difficult to suppose, that if, in any of those transactions on which policies are usual a gaming policy were worded like a common wager, it would be held to be thus exempted from the operation of the 14 G. 3.

To such cases the expressions of Lord Mansfield in Foster v. Thackery, cited by Buller, J., in Good v. Elliott, [3-T. R. 693] would foreibly apply. "What," said his lordship, "is a policy? It is derived from a French word which means a promise. Is a particular form necessary? Must it begin, "In the name of God, Amen'? or refer to Lombard Street? A mercantile policy we all know, but a gaming policy is a mere wager. If the form were essential under the act, it may be evaded immediately: for it may begin, "We promise, if war be declared, we will pay," &c. Apply that to mercantile affairs: "We promise, if the ship sails, and does not arrive," &c." Perhaps few readers have perused the admirable judgment of Mr. J. Buller, in the case of Good v. Elliott, without feeling regret that his construction of the act was not adopted, and all idle wagers whatever held to be invalidated by it. See also the remark of Lord Denman, C. J., in Fisher v. Waltham, 4 Q. B. 893.

It must indeed be observed that, even as the law now stands, many such are void as contravening public policy: for instance, between voters as to the result of an election, Allen v. Hearn, 1 T. R. 56: or whether T. W. would be transported for forgery, Evans v. Jones, 5 M. & W. 77. So, in Fisher v. Waltham, 4 Q. B. 889, where a clerk having betted that he would

not pass his examination for admission as an attorney, the bet was held void on the ground that he had the event in his own hands, which it is presumed the court looked upon as a circumstance inconsistent with there being a consideration for the defendant's promise.

The legislature also has interposed to render wagers, with some few exceptions, incapable of being enforced by action, though not to make them absolutely illegal, for the statute 8 & 9 Vict. c. 109, s. 18, enacts, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." [Coombes v. Dibble, L. R. 1 Ex. 248; Batson v. Newman, 1 C. P. D. 573; Diggle v. Higgs, 2 C. P. D. 422; Trimble v. Hill, 5 App. Ca. 342.]

This section does not prevent a person who repudiates a wager before it is decided from recovering his deposit from a stakeholder. Varney v. Hickman, 5 C. B. 271. [See also Martin v. Hewson, 10 Exch. 737, where to a plea that the money sought to be recovered in the action had been deposited in the defendant's hands as a stakeholder, to abide the event of an illegal game on which the money had been wagered by the plaintiff, a replication that before the result of the wager the plaintiff had repudiated it and required a return of the money, was held to be good; and see Hampden v. Walsh, 1 Q. B. D. 189, 45 L. J. Q. B. 288, where the repudiation did not take place till the wager was decided, and the stakeholder was about to pay over the money; and Batson v. Newman, 1 C. P. D. 573. Money paid in payment of bets, at defendant's request, may be sued for and recovered, Ex parte Pyke, 8 Ch. D. 754: so in Beeston v. Beeston, 1 Ex. D. 13, 45 L. J. Ex. 230, the plaintiff was allowed to sue upon a cheque given by the defendant for the plaintiff's proportion of money won by bets made on behalf of both by the defendant; and in Bridger v. Savage, 15 Q. B. D. 363, 54 L. J. Q. B. 464, the plaintiff was held entitled to recover from the defendant the amount received by the latter in payment of bets made by him on commission for the plaintiff. In Read v. Anderson, 13 Q. B. D. 779; 53 L. J. Q. B. 532, the plaintiff was held (Brett, M. R., dissenting) entitled to recover from the defendant the amount which he had paid for bets made by him in his own name on behalf of the defendant, but which the defendant had repudiated, and forbidden him to pay after they were lost. In Thacker v. Hardy, 4 Q. B. D: 685; 48 L. J. Q. B. 289 (followed in Ex parte Rogers, 15 Ch. D. p. 214), it was held, affirming the judgment of Lindley, L. J., that the plaintiff, a stockbroker, who had been employed by the defendant to buy and sell stocks on the terms that "differences" only should be paid between them, no stocks being actually delivered, was entitled to be indemnified by the defendant against the personal liability incurred by him in effecting such contracts.]

By sect. 19 [(repealed, except as to inferior courts, by 46 & 47 Vict. c. 49, ss. 4 and 7)] it is provided that it "shall be lawful," in cases of feigned issues, for the court to direct them in a form given in the schedule to the act. Where a feigned issue was made up since the statute in the old form of a wager, an attempt was made to stay the proceedings upon it, on the

grows that it the lossel a contract in contract without of the 18th section. The court however refuses a rule to show each to 22 draft of each that it was not a wager within the metable of the set I = 00. $I_1 = 2$ to $I_2 = 3$ s. See, also, as to what contracts amount to wager within the meaning of this set $I_1 = 0$. Short in Eq. B. 904 $H_{(T_1)}$ in Sec. 2. C. P. D. 76

A foot race has been held to be a lawful gene within the provise at the end of sect. Is B(m) as M upon (5,6) B. SIST but where the free-section is in substance a wager, the provise does not protect it; therefore, in Diggle as M upon (2,1,3) B. We was to be the term of Aparth even the B and A upon (3,6) B. SIST that whom two presents had the section of the sum each, to abide the event of a walking match between them, it was competent for one of them to revoke the stakeholder's authority to pay over the money, and to recover it bank by a form I and I and I and I and I.

A kind of gaining beying sprong up to the opening or places, then Betting Houses, the owners of which received money on the promise to pay so much upon the events of horse-races or the like, the statute 16 & 17 Vict. c. 119. Was passed, by which every such mets to be readle or place / dec. v. Miller, L. R. 9 Q. B. Girl, B. 8 v. I. L. R. C. P. 10 v. Morres, 8 Q. B. D. 275 of L. J. M. C. 38. Some v. Mill, 14 Q. B. D. 388 of L. J. M. C. 95 [1] are declared to see mine in gaining houses within the meaning of the 8 & 9 Vict. c. 169, 8.2. by 8.4. persons receiving memory in any such house are made. Uselic to a penalty, and the means so paids on the freedom ered back under 8.5, as paid to the use of the party making the deposit. [This act has been amended by 37 Vict. c. 15, as to the scope of which act, see for v. A. Brass, 12 Q. B. D. 125 of L. J. M. C. 161; the 35 & 36 Vict. c. 94, 8, 17; and for an instance of gaming under this latter statute. Here v. Harston, 3 Q. B. D. 164.

The s & 9 Viet, c. 109 did not extend to India (where however, it has since been followed), and therefore by the common law of Logland, which was in force in India in 1846), an action was maintainable on a wager made there, although the parties had no previous interest in the subject matter, if the wager was not against public policy, or against the interest or feelings of third parties, and did not lead to any indeed of cyclene. See Limital Thorkways where Vision and India had been did to the train of the Control of the Cont

With respect to the nature of the interest which the 14 Geo. 3, c. 48, requires, Lord Tenterden, in Hubant v Kymer to B & C 725 expressed a strong opinion that it must be eigen universities. A polley effected by a father, in his own name, on the life of his son, was, in that case, held void. " It is enacted," says Bayley, J , " that no greater sum shall be recovered than the and and of the value of the interest. Now what was the recent of the value of the interest in this case? Certainly not one farthing. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life, in his the son's name, not for his the father's own benefit, but for the benefit of the son, there is no law to prevent his doing so; but that is a transaction quite different from the present" | See also Helshon v. West. 3 B. & S. 579. In Worthington v. Cartis, 1 Ch. D. 410; 45 L. J. Ch. 259, a father had effected a policy for his own benefit on the life of and in the name of his son, and on his son's death had taken out administration, and received the sum insured. In a credit or's suit it was held that, as the office had not chosen to resist the claim, the maxim polior est could be assistatis applied, and the father was entitled to retain the money as against the creditors |

A creditor (as is well known) has an insurable interest in the life of his debtor, Anderson v. Edie, Park. Ins. 8th ed. 915; unless, indeed, the debt be an illegal one, Dwyer v. Edie, Ib. 914; [see Hebdon v. West, just cited, where it was held that a clerk in a bank had an insurable interest in the life of the managing partner by reason of an engagement by the manager to employ the clerk at a certain salary for seven years, to the extent of so much of the seven years as remained unexpired at the time of the effecting of the policy. And in the same case the court held that the clerk had no insurable interest by reason of a promise to him from the manager that he would not, during his life, enforce payment of a debt due from the clerk to the bank. One of two joint obligors of a bond has an insurable interest in the life of the other, Branford v. Saunders, 25 W. R. Ex. 650.

Upon the analogous question what constitutes an insurable interest in cases of marine insurance which, as we have seen, are excluded from the operation of this statute, see judgment in Seagrave v. The Union Marine Insurance Co., L. R. 1 C. P. 305; Wilson v. Jones, L. R. 1 Ex. 193, 2 Ex. 139; Ebsworth v. Alliance Marine Insurance Co., L. R. 8 C. P. 596; Inglis v. Stock, 10 App. Ca. 263; 54 L. J. Q. B. 582.]

A trustee may insure in respect of the interest of which he is trustee, Tidswell v. Angerstein, Peake, 151. Lord Kenyon held, at Nisi Prius, that a wife who had insured her husband's life, need not prove that she was interested in it, for it must be presumed. Read v. Royal Exchange Insurance Co., Peake, Ad. Ca. 70. It has been always considered clear that a man may insure his own life; but, as has been already observed [p. 307], the Court of Exchequer has expressed an opinion in Wainwright v. Bland, that a man cannot, in order to evade the statute, legally insure his own life with the money and for the benefit of another. Indeed, there would be another objection to such a proceeding, arising from sect. 2 of the statute, which requires the insertion of the name of the person on whose account the policy was underwritten. [See Evans v. Bignold, L. R. 4 Q. B. 622, and Shilling v. The Accidental Death Insurance Co., 2 H. & N. 42, in which case an action was brought by the executrix of J. S. upon a policy of insurance on his life, and a plea alleging that the policy had been made by T. S. in the name of J. S., but for the use and benefit of T. S., and not for the use or on account of J. S., and that T. S. had not any interest in the life of J. S. was held to be a good plea.] Quere, if an allegation in a declaration upon a policy that A, and B. were interested, is satisfied by proof that A. was mortgagor, and B. mortgagee. See Pim v. Reid, 6 M. & Gr. 1.

We have already seen that sect. 3 of the 14 Geo. 3, c. 48, provides that in all cases in which the assured had an interest in the life or event in respect of which the policy is effected, no greater sum shall be recovered or received from the insurer or insurers than the value of that interest at the date of the policy.

The Court of Queen's Bench put upon these words in Hebdon v. West, supra, the construction, that where there are several policies effected with different offices, the assured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest. "Looking," said the court, in that case, " to the declared object of the legislature, we are of opinion that though, upon a life policy, the insurable interest at the time of the making the policy, and not the interest at the time of the death, is to be considered, it was intended by the 3rd section of the act that the insured should in no case recover or receive from the insurers (whether upon one policy or many traces than the manuary after a which the person realizes the insertance had at the time he bound the life. If for greater scorely be thinks if to more with many poless and to offer common as a fine part to do not introduce and respect to the presidence of the structure of the at life to do not introduce and of the produce of the structure of the structu

The principal case of Godsall v. Boldero did not indeed turn on the statute of 14 Geo. 3, but on the common-law doctrine, that insurance is a contract of indemnity, the set applying to the whole the fine of the set applying to the whole the insure. It is not be a fine of the statute is only to require an interest in the discussion of the diagonal fine of the statute is only to require an interest in the discussion of the diagonal fine of the statute is only to require an interest in the discussion of the diagonal fine of the statute is only to require an interest in the discussion of the diagonal fine of the statute is only to require an interest in the discussion of the diagonal fine of the statute is only to require an interest in the discussion of the s

Atthough the doctrine established by 6 stall y B 1 and been recognised in Z a sette distributed at March 179 III as a filled set A Harris Rep. 434; Barber v. Morris, 1 M. & R. 62, it had been decided that the converse of Godsall v. Boldero did not hold good; so that where an owner of stacks maliciously set on fire, had been paid the amount of his loss by an insurance office, he was allowed, notwithstanding, to recover against the hundred, under the 2 G 1, e 22 Chapter Highligan, 2 W 4 C 23, S 1 Manual Supplies 2 Marshall on Insurance and of the 1 the c White 4 Bing N. C. 272. [And in a recent case, it was held that in an action for personal injuries sustained through the defendant's negligence a sum received by the plaintiff upon an accidental insurance policy could not be taken into account in reduction of damages. They are a group Waller Land C. L. R. 10 Exch 1, cf John v. F at W. Long Del Chy, L. R. McC P. 300. In the case Holland v. S. Mr. G. Lap. 11. Land Ellenberrough sermed to be of aginlow that if A. insured the life of B. his debtor, and afterwards the debt was paid off, B. might, by continuing to pay the premiums, keep the policy alive for his own benefit. [As to the circumstances under which a stranger to the policy who pays premiums to keep it up, may acquire a lien for the amount so paid, see Leve Lest 23 Ch D 32, 32 L J Ch 702

That the statute only applied to the original parties to the contract, and not to their assignees, we have already soon lattle case of 1100 v 1000 and part, p 307; the effect therefore of the decision in 1500 v 1000 v 1000 and London 188. Co., seems to be to put the original party effecting the policy in the same position as an assignee confessedly was in, and to make the contract itself what in its terms it purports to be, not one of indemnity, but an engagement to pay a certain sum on the happening of a certain event, in consideration of the payment of the premiums in the meanwhile.

But merica insurances and insurances against fire still remain, as they properly in terms to be, contracts of indemnity; thus, in Powles v. Innes, 11 M. & W. 10, it was held that a person who assigns away his interest in a ship or goods after affecting a policy of insurance upon them, and before the loss, cannot sue upon the policy: except as a trustee for the assignee in a case where the

policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. [On the other hand the insurable interest of the assured is not determined by his parting ofter the loss with the property insured, for he may sue as trustee for the person to whom he has assigned it, together with his interest in the policy, Sparkes v. Marshall, 2 Bing. N. C. 761. As to where a trustee may sue and what he may recover, see Ebsworth v. Alliance Marine Insurance Co., L. R. 8 C. P. 596; Collingridge v. Royal Exchange Assurance Corporation, 3 Q. B. D. 173. Where a contract of sale of property insured contained no reference to the insurance it was held (James, L. J., dissenting), that the vendor who on the destruction of the property by fire before payment of the purchase-money recovered the amount insured did not receive it as trustee for the purchaser and could not be compelled to hand it over to him, Rayner v. Preston, 18 Ch. D. 1, 50 L. J. Ch. 472.

By 31 & 32 Vict. c. 86, the assignee of the policy is empowered to sue in his own name where any policy on ship, goods, or freight has been assigned, "so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured." In Lloyd v. Fleming, L. R. 7 Q. B. 299, it was held that the assignee of a policy "duly assigned," after loss, might under the above provision properly maintain an action in his own name on the policy; and see North of England, &c., Co. v. Archangel, &c., Co., L. R. 10 Q. B. 249. The Judicature Act, 1873, 36 & 37 Vict. c. 66, also contains wide provisions for transferring to the assignees of legal choses in action all legal rights and remedies in respect of the same, see s. 52, sub-s. 6.

Though where property insured has been destroyed by fire after a contract of sale, the unpaid vendor, while retaining his right to compel payment of the purchase-money, can nevertheless before it has been paid enforce his claim against the insurers, Collingridge v. Royal Ass. Co., supra, the latter who have so paid will be entitled to recover back from him after payment by his purchaser an amount equal to the sum recovered by him under the insurance. For the contract of fire insurance being one of indemnity the insurers are not merely subrogated to all rights of action of the assured whereby his loss may be diminished, but are also entitled to the benefit of anything which the assured has received in reduction of the loss, provided it was due to him as of right and was not merely bestowed as a gift, see Castellain v. Preston, 11 Q. B. D. 380, 52 L. J. Q. B. 366; distinguishing Burnand v. Rodocanachi, 7 App. Cas. 333, 51 L. J. Q. B. 548. See also Darrell v. Tibbitts, 5 Q. B. D. 560; 50 L. J. Q. B. 33; Marine Insurance Co. v. China Transpacific Steamship Co., 11 App. Ca. 573.

Another effect of the rule that insurance other than life insurance is a contract of indemnity is that] if there be two insurers of the same subject-matter, and one of them pays the loss, the other is discharged, Morgan v. Price, 4 Exch. 615. The rule, however, is [when applicable] subject to a qualification which applies to all cases of valued policies, namely, that the parties may agree upon a merely arbitrary estimate of the value of the subject insured, by way of liquidated damages; and this estimate will, in the absence of fraud, be the measure of the liability of the insurer. See Irving v. Manning, 6 C. B. 391; [Barker v. Janson, L. R. 3 C. P. 303.

The effect of this rule as to the valuation in a policy, combined with the other as to insurances being a contract of indemnity is, that where an assured has been reimbursed, either by payment of another policy or otherwise, the amount received goes in reduction *pro tanto* of his claim, and if it amounts

to the valuation in the policy, it extinguishes the claim. On this principle was based the decision in Ir may v. I. Journal 1. M. a Rob 11. There is the defendant had insured for 17000 with a Glasgow company and 2500 with the Alliance office, on the ship 8 ytems, valued in 100 p. In its at 30000. The received both somes the Alliance net being when the paid, exare of the former insurance. The Alliance afterwards brought an action to recover back 7000, being the excess of the amount paid above the value declared, and Lord Tenterden held them entitled to recover, the defendant being bound by the valuation in the policy, though the vessel was really worth \$7000.

[It is true that in Bous 6 hl v Barries 4 Camp 225 where the values declared were 6000%, in one policy, and 8000%, in another; the insured was permitted to recover 600/ upon the former policy. Cough he had already recovered 6000l. on the latter, the real value being 8500l. [It is however submitted that Boxyo I v Brines, while a was doubted in Irolly v Robinsh son, must be considered as overraled by Binney James, I H & C 769 32 L J. Ex 132. In that case the action was brought on a policy of insurance for 2400l. effected on a ship valued at 3200l. The ship was insured by other policies, in one of which the value was fixed at bound. On these other policies the plaintiff had received 3126l. 13s. 6d., and he was held entitled to recover only the difference between that sum and 32001., the value in the policy sued upon. In North of Landald Inchinese Ise v. Destroy L. R. v Q. B. 244, a ship which had been insured in a valued policy for 6000f, was run down and sunk by another ship, and the sum of comple was the reupon public by the underwriters to the owners. The owners afterwards recovered 50007, in a suit in the Court of Admiralty in respect of the damage caused by the collision, and It was held, that although the true value of the ship was 9000/, the underwriters were nevertheless entitled to the damages thus recovered, which were in the nature of salvage. See also Commercial Union Ass. Co. v. Lister, L. R. 9 Ch. 483, 43 L. J. Ch. 601

A policy on goods "lost or not lost," is a contract of indemnity against all post as well as all forms losses sustained by the assured in respect to the interest insured; where therefore a policy was effected on but bales of cotton, lost or not best, at and from Bombay to London, it was held the assured might recover for damage to the goods from perils of the sea during the voyage, although such damage had been sustained before the purchase of the goods by the assured, it not appearing that the goods had been purchased as damaged goods, Sutherland v. Prott. 11 M. & W. 206

[It must be observed that the 19 Geo. 2, c. 37, does not apply to foreign ships. They were omitted from its provisions, it is said, owing to the difficulty of bringing witnesses from abroad to prove interest. Insurances on foreign ships are therefore valid, even though there is no interest, provided the policy appears on the face of it to be a wager policy; see TheMusson v. Fletcher, 1 Dough. 315; Cranford v. Hanter, 8 T. R. 13; Lucina v. Cranford, 3 B. & P. 101; and Consins v. Nantes, 3 Taunt. 512.]

The principal case settled the English law, as to the nature of life insurance, and distinctly held that a policy of life insurance is not a contract of indemnity merely, and that if the insurer

has an interest in the insured at the time the contract was made, he can recover in the event of a loss; Godsall v. Boldero, 9 East 72, was overruled by the principal ease, only in respect to this rule concerning the insurance of lives, and is nevertheless consonant with the law both in England and America, relating to fire and marine insurance, in so far that the decisions, with a few exceptions, uniformly maintained the proposition, that there must be an interest in the insurer, both at the time of the inception of the contract and at the time of the loss.

Although wager policies seem to have been recognized as valid in England before the 19 G. II. c. 37, they never have been so recognized in the United States, except in the state of New Jersey, and in a few early cases in the state of New York.

I. As to Marine and Fire Insurance.

- (a 1) Wager policies. In Howard v. Albany Insurance Co., 3 Den. 301, the court defines a wager policy as follows: "When the insured has no interest at stake, the policy is a mere wager, where one party stakes the sum insured, and the other the premium paid, on the happening or not happening of a certain event." Wager policies were sometimes reluctantly supported; in Juhel v. Church, 2 Johns. Cas. 333, where it is held that an insurer, having insured the profits to be made on a cargo which was to be brought by a certain ship, when in fact the ship brought no cargo at all, could not recover the premium which he had paid, Kent, J., said, "I consider this a wager policy; it was a mere betting on the return of the ship, and if she had not returned, in consequence of any peril enumerated in the policy, the plaintiff would, on its production, have been entitled to the sum insured, . . . without proving any interest or goods on board." See, also, Clendining v. Church, 3 Cai. 141; Buchanan v. Ocean Ins. Co., 6 Cow. 318; See, however, per Ogden, arg. 6 Cow. 325.
 - (a^2) The weight of authority is against wager policies. With the exception of the cases above cited, the decisions are uniformly against the maintaining of an action on a wager policy. In Pritchet v. Ins. Co., 3 Yeates 458, apparently the first case in this country where a wager policy was in issue, the court says "At the common law, a person might have insured without any interest. The system of national policy which dictated the act of 19 Geo. II. c. 37, has been adopted by our

courts." In Amory r. Gilman, 2 Mass 1, the polaritif endeavored to show that the policy was a wagering policy, and that, as such, it was valid; the court, while holding that the policy was a policy of interest and not a wagering policy, took occasion to say, "It would seem a disgraceful we upstion of the courts, to sit in judgment between two gamblers, to decide which was the better calculator of chances, or which the more cunning of the two."

And by Sedgwick, J., "This [as to a wager policy] is a very important question, and comes before this court for the first time." He apparently concedes that at common law, wager policies were valid, but discourages them in his opinion in this case, as hostile to public policy.

Dana, Chief Justice: "As on a wager policy, my present opinion is, that the plaintiff cannot recover. No precedent of such an action supported here has been produced, and I believe none can be produced. We must, therefore, double this on general principles of justice and good policy. The very forelble reasons set forth in the preamble of the 12 Geo, H. c. 37, to which I have before referred, apply equally to this and every other civilized and well-governed commercial country. Whether that statute extended to this country or not, is a question not necessary now to be determined. But if it were, and we should find no precedents in our own courts to overrule us, I should be prepared to say that, as wager policies are injurious to the morals of the citizens, tend to encourage an extravagant and meanhar, hazardous species of gaming, and to expose their property. which ought to be reserved for the bounds of real commerce. they ought not to reverve the aduntantance of this court." See Adams v. Penn. Ins. Co., I Rawl. 97; Wilson v. Hill, 3 Met. 66; Howard v. Albany Ins. Co., 3 Den. 301; Sevyer v. Mayhew, 51 Me. 398; Peabody v. Wash, Ins. Co., 20 Barb, 339; Freeman v. Fulton Ins. Co., 38 Barb. 247; Tallman v. Atlantic Ins. Co., 29 How. Pr. 71; Murdodk v. Chenango Ins. Co., 2 Comst. 210; Hone r. Mut. Ins. Co., 1 Sandf. 137; Eagle Ins. Co. v. La Fayette Co., 9 Ind. 443; Ill. Mnt. Fire Ins. Co. v. Marseilles Manf. Co., 1 Gil. 236; Gilbert r. N. Am. Ins. Co., 23 Wend. 43; Etna Ins. Co. v. Kittles, 81 Ind. 96; Sweeny v. Franklin Ins. Co., 20 Pa. St. 337; 3 Kent's Com. 371. And even where two tenants in common were jointly insured against fire, but one of them had assigned his interest in the premises to the other, it

was held that they could not maintain a joint action on the policy: Murdock v. Chenango Co., 2 Comstock 210; while it is necessary that the insurer in order to recover upon his policy, must show an interest in the subject of the insurance, the mere fact that the policy exceeds in amount the actual loss sustained, would not necessarily cause the policy to be construed as a wager; Franklin Fire Ins. Co. v. Vaughan, 92 U. S. 516; De Longuemere v. The Phænix Ins. Co., 10 Johns. 127. And where there is a disparity between the estimated value of the property insured, and its actual value, in the absence of fraud, the plaintiff may recover the full amount of his policy; 1 Sumn. 451; Clark v. The Ocean Ins. Co., 16 Pick. 289. In the latter case the court lays down the general rule, that if the insured has some interest, and the valuation is fair, and made with a view to an indemnity and not for a wager, the court will not open it, nor set it aside on account of an over estimate of the interest at risk. In Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341, where the value of the subject of the insurance was uncertain, it was held that the valuation should not be set aside, although it greatly exceeded the actual value; and when the valuation is made by the insurer, he is, in the absence of fraud, estopped from disputing it, and is liable for the value fixed, although the real value of the loss is less than the value insured; Clark v. The Ocean Ins. Co., 16 Pick. 289; Atlantic Ins. Co. v. Lunar, 1 Sandf. Ch. N. Y. 91; Forbes v. The Manfg. Ins. Co., 1 Gray 371; Akin v. Ins. Co., 16 Martin (La.) 661; Lovering v. Merc. Ins. Co., 12 Pick. 348; Whitney v. Amer. Ins. Co., 3 Cow. 210; Davy v. Hallett, 3 Cai. 16; Fuller v. Boston, &c., Ins. Co., 4 Met. 206; Pritchet v. Ins. Co., 3 Yeates 458; Gardner v. Col. Ins. Co., 2 Cr. C. C. (U. S.) 473; Alsop v. Com. Ins. Co., 1 Sumner 451; Carson v. Mar. Ins. Co., 2 Wash. C. C. (U. S.) 468; Marine Ins. Co. v. Hodgson, 6 Cr. (U.S.) 206; Patapsco Ins. Co. v. Coulter, 3 Pet. (U.S.) 222; Griswold v. Union, &c., Ins. Co., 3 Blatch. (U.S.) C. C. 231; Howland v. Ins. Co., 2 Cr. C. C. (U.S.) 474. See Wolcott v. Eagle Ins. Co., 4 Pick. 429.

(b) Insurable interest. — The interest need not be that of a legal title, but may be such only that the insured is pecuniarily interested in the preservation of the subject of insurance. In Carter v. The Humboldt Ins. Co., 12 Ia. 287, the plaintiff was held entitled to recover on a policy which he had effected to protect his mechanic's lien on a hotel and the court in that case says: "The principal question is, whether a mechanic's lien is an insurable interest. Insurance is a contract of indemnity with a person who has an interest in the preservation of property, or a limited qualified interest in property, or any reasonable expectations of property or advantage to be derived therefrom.

"It may be generally said, that any interest may be insured, if the peril against which insurance is made would bring upon the insured by its immediate and direct effect a poluminy loss." See Franklin Ins. Co. v. Coates, 14 Md. 285; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Rebriach v. Germama Fire Ins. Co., 62 N. Y. 47; Sansom v. Ball, 4 Dall, 450; Ins. Co. v. Baring, 20 Wall, 159; Four v. New Orleans Mut. Ins. Co., 53 Ga. 578; Robibach v. J.Ima Ins. Co., 1 T. & C. (N. Y.) 939.

A commission merchant has an insurable interest in the goods consigned to him; or any person having possession and r a contract that may afford him profit; Robinson v. N. Y. Ins. Co., 2 Car. 357; Longhurst v. Star Ins. Co., 19 Lt. 364. So. with warehousemen, carriers, and bullets of goods where a loss would pecumarily affect thom; Sayane . Corn Ins. Co., 4 Bosw. 1; affirmed 36 N. Y. 655, 12 Burb. 595; Putman v. Morr. M. Ins. Co., 5 Met. 386; French v. Hope Ins. Co., 16 Pack, 397. So with a sheriff in goods he sources: White c. Madison, 26 N. Y. 117; Warren v. Fire Insurance Co., 31 Ia. 464. An equitable interest is an insurable interest; Swift r. Vi. Mut. Fire Ins. Co., 18 Vt. 305; where it was hold that a policy, issued to one who had possession of real estate under a defective deal, but who was so situated that he could compel in equity a valid conveyance from the holder of the logal title, was valid. See Curry r. Com. Ins. Co., 10 Puk. 535. Even a trespasser, it seems, has an insurable interest, which cannot be disputed by the insurance company; Mayor, &c. v. Brooklyn Ins. Co., 41 Barb. 231. A mortgagee may insure his mortgage interest, though probably not beyond it: Davis v. Quincy Mut. Fire Ins. Co., 10 Allen 113; Holbrook r. Amer. Ins. Co., 1 Curtis C. C. 193; Fox r. Phonix Ins. Co., 52 Me. 333. A mortgagor may insure his property to its full value, whether the mortgage was made before or after the policy; French v. Rogers, 16 N.H. 177; see Carpenter v. Prov. Ins. Co., 16 Pet. 495; and even if his equity of redemption has been seized on execution; Strong r. Manf. Ins. Co., 10 Pick. 40; and so long as an equity remains in him, even after foreclosure until the title passes,

Stevens v. III. Ins. Co., 43 III. 327. A mortgagor and mortgagee may each insure the same building, and their particular interest in the property insured need not be described; Traders' Ins. Co. v. Robert, 9 Wend. 405; Strong v. Manf. Ins. Co., supra; Curry v. Com. Ins. Co., supra; Allen v. Franklin Ins. Co., 9 How. Pr. 501. Conveyances in the nature of a mortgage leave an interest in the grantor sufficient to support a policy of insurance; Holbrook v. Amer. Ins. Co., 1 Curtis C. C. 193; Russell v. Southard, 12 How. 139; Tittemore v. Vt. Mut. Fire Ins. Co., 20 Vt. 546; Higginson v. Dall, 13 Mass. 96; Gilbert v. No. Am. Ins. Co., 23 Wend. 43; Bartlett v. Walter, 13 Mass. 267; Lazarus v. Com. Ins. Co., 5 Pick. 76. A vendee in possession under an executory contract to purchase has an insurable interest; Shotwell v. Jefferson Ins. Co., 5 Bosw. 447; Draper v. Com. Ins. Co., 21 N. Y. 378; Col. Insurance Co. v. Lawrence, 2 Pet. 25; "Etna Ins. Co. v. Miers, 5 Sneed (Tenn.) 139; Ayres v. Hart. Ins. Co., 17 Ia. 176; McGivney v. Phœnix Ins. Co., 1 Wend. 85. A person liable as indorser or as a bondman for safe keeping of property has an insurable interest to the extent of his liability; Insurance Co. v. Chase, 5 Wall. 509; Russell v. Union Ins. Co., 4 Dall. 421; Fireman's Insurance Co. v. Powell, 13 B. Mon. (Ky.) 311; Strong v. Man. Ins. Co., 10 Pick. 40; Williams v. Roger Williams Ins. Co., 107 Mass. 377. Also, those generally liable by statute, or by common law, or by contract, for the safe keeping of property of another, may protect themselves by insurance; as railroad companies; Eastern R. R. Co. v. Relief Insurance Co., 105 Mass. 570; Monadnock R. R. Co. v. Manf. Ins. Co., 113 Mass. 77; common carriers; Chase v. Wash. Ins. Co., 12 Barb. 595; bailees having the goods of another for repairs or manufacture; Getchell v. Ætna Ins. Co., 14 Allen 325. A mechanic's lien constitutes an insurable interest. See 12 Ia. 371, supra; Franklin, &c., Ins. Co. v. Coates, 14 Md. 285; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Merchants' Insurance Co. v. Mazange, 22 Ala. 168.

(c) Rule of damage and adjustment of loss. — In the absence of agreement as to value of interest, the value will be limited to simple compensation for actual loss; Brinley v. Nat. Ins. Co., 11 Met. 195; and after the compensation is received, no matter from what source it comes, further action against the

insurer is precluded; Craig r. Margatroyd, 4 Years, 161. See Wood on Fire Insurance, chap. xv.

(d) Continuity of interest. The interest must exist at the time of the loss; Wilson c. Hill, 3 Met. 66; Carroll c. Boston Marine Insurance Co., 8 Mass. 515; Stetson v. Mass. Mutual Fire Ins. Co., 4 Mass. 330; Mundock c. Chenango Co. Ins. Co., supra; French v. Rogers, 16 N. H. 177; Amor. J. Gilman, supra; Seamans v. Loring, I. Mas. (U.S.) 127; 3 Kent's Com. 371, 2d Am L. C. 5th ed 881; Fowler v Ind. Ins. Co., 26 N. Y. 122 Although a temporary suspension of interest will not invalidate the policy; Rev v. Ins. Co., 2 Phila 357; Lane r. Me Mut Fire Ins. Co., 3 Fairf. (Me.) 41; Wood r Ruts lands, &c., Ins. Co., 31 Vr. 552; Taylor e. Lowell, 3 Mass 531; Worthington v. Beuse, 12 Allon 382; N. E., &c., Ins. Co. v. Shettler, 38 Ill. 166; Kingsley v. N. E., &c., Ins. Co., S Cush. 393; Gordon v. Mass. F. & M. Insurance Co., 2 Park. 249; Lazarus v. Com. Ins. Co., 5 Pick. 76: Strong v. Insurance Co., 10 Pick, 40; Jankson v. Mass. M. F. Ins. Co., 23 Piol., 418; Hooper v. Hudson River Ins. Co., Lo Barb, 416; s. c. affirmed 17 N. Y. 424. But see the case of Cockerill v. Cincinnati Ins. Co., 16 O. 148.

II. As to Late Insurance.

- (a) Interest in the insured is necessary. It is well settled that the insurer in a life policy must have some interest in the insured. In Singleton c. St. Louis Mut. Ins. Co., 66 Mo. 63, where a nophew insured the life of his uncle, it was held that the plaintiff had not an insurable interest in the life and could not recover; Ruse v. Mut., &c., Benefit Assn., 23 N. Y. 516. See Guardian Ins. Co. r. Hogan, 80 III. 35; Benefit Assn. r. Hoyt, 46 Mich. 473. See Clark v. Allen, 11 R. I. 439; Trenton, &c., Ins. Co. r. Johnson, 4 Zabr. 576.
- (b) As to the nature and extent of the interest. The law seems well settled that in cases of fire and marine insurance the interest of the insurer in the subject of insurance must be such that it can be estimated in dollars and cents; in other words, that in these cases the policy is a contract of indemnity; but in cases of life insurance, while it seems that the interest of the insurer, or of him who seeks to enforce the contract, must be, in a certain sense, a pecuniary interest, the measure and interpretation of the pecuniary interest is of a much wider

scope; in other words, a policy of life insurance is a valued policy, and if the relationship between the parties is such as would support a gift or grant at common law, so that the imputation of a wagering intention is not primâ facie raised, the contract can be enforced; Lord v. Dall, 12 Mass. 115; Loomis v. Eagle, &c., Ins. Co., 6 Gray 396; Ætna Life Ins. Co. v. France, 94 U.S. (4 Otto) 561; Grattan v. Nat. Life Ins. Co., 15 Hun 74; Hoyt v. N. Y. Life Ins. Co., 3 Bosw. 440; McKee v. Phœnix Ins. Co., 28 Mo. 383; Eq. Life Assurance Soc. v. Paterson, 41 Ga. 338; St. John v. Amer., &c., Ins. Co., 2 Duer 419. See Stevens v. Warren, 101 Mass. 564. A creditor has an insurable interest in the life of his debtor to the amount of the debt; Morrell v. Trenton Mut. Life & Fire Ins. Co., 10 Cush. 282; Rawls v. Am. Life Ins. Co., 36 Barb. 357, 27 N. Y. 282. So the debtor may insure his own life to an amount beyond the debt for the benefit of his creditor, the balance over the debt enuring to such parties as the debtor may designate; Am. Life, &c., Ins. Co. v. Robertshaw, 26 Pa. St. 189; and it has been held in New York that one member of a firm, who furnished the capital in the business, could insure the life of his partner on the ground that the death of that partner would imperil the capital invested; Valton v. Nat., &c., Assurance Soc., 22 Barb. 9; affirmed, 20 N. Y. 32. It seems to be well settled that where one has an expectation of pecuniary profit through the execution of a contract which the death of one of the parties would defeat, he has an insurable interest in such party's life. And i. seems to be immaterial, so long as the profits anticipated are necessarily uncertain in amount, what amount is insured. Such a policy is, to this extent, a valued policy, the amount of the policy being an agreed statement of the amount at risk, which cannot afterwards be denied by the company; Bevin v. Conn. Mutual Life Ins. Co., 23 Conn. 244; Morrell v. Trenton, &c., Ins. Co., 10 Cush. 282, supra; Hoyt v. N. Y. Life Ins. Co., 3 Bosw. 440; Miller v. Eagle, &c., Ins. Co., 2 E. D. S. (N. Y.) C. C. P. 268. See Forbes v. Amer. Mut. Life Ins. Co., 15 Gray 249.

(c) Continuity of the interest. — The principal case settled the law in England, that if an insurable interest existed in the insured at the inception of the contract, the provisions of the statute, 14 Geo. III. c. 48, have been complied with, and it will not defeat his right of recovery if that interest is lost

before the death insured against occurs. Whether this rule obtains in the United States has been doubted: Mut. Life Ins. Co. v. Wager, 27 Barb. 354; Kennedy v. N. Y. Life Insurance Co. 10 La. An. 809; but while it has not been distinctly adjudicated that the insurable interest need exist only at the incoption of the contract, there are dieta which show the favor with which this view that a continuing interest in a lite policy is not necessary, is regarded by eminent justices; Phonix Mut. Life Ins. Co. v. Bailey, 13 Wall. (U. S.) 616; Gratian v. Nat. Late Ins. Co., 15 Hun 74, supra; Valton v. Nat. Lean Fund Life Assn. Co., 22 Barb. (N.Y.) 9; St. John v. Am. Mut. Ins. Co., Li N. Y. 31; Conn. Ins. Co. v. Schaefer, 94 U. S. 457. And see Rawls v. Amer. Mut. Life Ins. Co., 27 N. Y. 282; Loomis v. Liple Life Ins. Co., 6 Gray 399; Conn. Mut. Life Ins. Co. v. Schaefer, 15 A. L. J. 394.

ROSE v. HART.

TRINITY, 58 GEO. 3. — C. P.

[REPORTED 8 TAUNT. 449.]

Trover for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed: Held, that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit within stat. 5 G. 2, c. 30, s. 28.

TROVER for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, who was a fuller, for the purpose of being dressed. At the trial, before *Holroyd*, J., at the Salisbury Spring Assizes, 1817, it appeared that when the cloths were so deposited there was a debt due from the bankrupt to the defendant for other cloths dressed by the latter. After the bankruptcy the plaintiffs tendered the sum due for dressing the cloths in question to the defendant, who refused to deliver them up, without payment of the whole debt due to him from the bankrupt. They then brought their action. For the defendant it was contended that the case came within the principle laid down in *Olive v. Smith (a)*, and that he was entitled to retain the cloths for his general balance. The jury found a verdict for the plaintiffs; and, *Holroyd*, J., having reserved the point,

Pell, Serjt., in Easter Term, 1817, moved for a rule nisi to set aside the verdict and enter a nonsuit, on the ground urged at the trial, and he cited Ex parte Deeze (b), as in point, and

observed, that the principle of the cases which contradicted the doctrine there laid down was vicious, masmuch as it went to destroy the law of lien.

Gibbs, C. J.—You are aware of the case of Green v. Farmer (a), which, by the by, I may say has been frequently disregarded. In a case in which I had the brief, and in which case Lord Ashburton was, a special custom for dyers to have their general lien was proved; and notwithstanding Green v. Farmer, that custom was acted upon in that case, and has been many times since recognised. The case Exparts Describes certainly contradictory to the case Exparts Ockenden (b), subsequently decided. The question is of the utmost importance, and we are quite open to hear it discussed. Take your rule.

Rule misi granted.

In the following Trinity term cause was shown by

Lens, Serjt., who contended that Lord Hardwicke, in Exparte Ockenden, recognised by Mansfeld, C. J., in Green v. Farmer, had much narrowed the extensive construction which he had put in Exparte Decre, on the words "mutual credits," in the stat. 5 G. 2, c. 30, s. 28, and had excluded cases like the present from its operation; and referred to the case of Chase v. Westmore (c), where a point similar to the present was made, but the court, thinking that that case did not involve the question of mutual credits, gave judgment on the point in lieu. He also cited Birdwood v. Raphael (d), and contended, that the decision in Olive v. Smith did not apply to the present case.

Pell was then heard in support of the rule. If the defendant had sold these cloths, and the assignees had brought their action for money had and received, they must clearly have allowed to the defendant the amount of their general balance against the bankrupt, before they could have recovered the difference, if any, from the defendant. Mutual credit is used as synonymous with mutual trust. "Where there is a trust between two men, on each side, that makes a mutual credit" (e). The case Ex parte Decze, and the whole reasoning of Lord Hardwicke on the subject of mutual credit in that case (which is recognised and confirmed in French v. Fenn, in Smith v.

⁽a) 4 Burr. 2214.

J. 1 Atk. 235.

⁽c) 5 M. & S. 180.

⁽d | 5 Price, 593.

⁽c) Per Buller, J., French v. Fenn.

Co. B. L. 536, 7th ed.

Hodson (a), and both by Gibbs, J., in his statement of his opinion at the trial in Olive v. Smith (b), and subsequently, by the whole court, in their final decision), is most strong for the defendant; but if the case Ex parte Ockenden, in which no judgment was given, is to be upheld against the case Ex parte Deeze, confirmed over and over again by subsequent decisions, then it is admitted, that the defendant cannot succeed.

It is true, that this is an action of trover, and no case of this precise nature has been decided; but the plaintiffs, by their choice of action, can never prevent the defendant from having the benefit of his statutable lien. In Jennings v. Cundall (c), the plaintiff shaped his case in tort, in order to deprive the defendant of the benefit of his infancy; but the defendant pleaded his infancy, and it was holden a good plea. In Ex parte Deeze, Lord Hardwicke says, "It is very hard to say that mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands belonging to a debtor of his, which cannot be got from him without an action at law or bill in equity, it should not be considered a mutual credit." "There have been many cases which the clause of the Act has been extended to, when an action of account would not lie, nor could this court, upon a bill, decree an account." These strong expressions acquire double strength when the judgment of Mansfield, C. J., in Olive v. Smith, is referred to. "I should have thought that the words of the statute meant only money transactions; but if the extension of mutual credit be, as it has been contended, a mistaken doctrine, the mistake is so deeply rooted that it would be rash to overturn it; and there is a great deal of justice in the determination at which, not only the Court of King's Bench, but the Court of Chancery, have arrived on this point." This is hardly saying less, than that the statute extends to cases of trover, and the whole judgment lays down the rule of extension on the broadest ground; a rule resting as much on sound law as it does on justice. (Burrough, J. Is it the true meaning of the Act, to extend the doctrine of mutual credit to cases where the goods are not ultimately to be turned into money? - Dallas, J. Where the goods are specifically to remain as goods?) Lord Hardwicke, in Ex parte Deeze, expressly goes on that ground. (Burrough, J. In Lanesborough v. Jones (d), which was a decision on stat. 4

⁽a) 4 T. R. 211.

⁽b) 5 Taunt. 58.

⁽c) 8 T. R. 335.

⁽d) 1 Peere Wms. 325.

Anne, c. 17, s. 11, the judgment of Lord Chancellar Corper went on the ground that there was a plain mutual credit.) In French v. Fenn, if trover had been brought, it must have been brought on the same ground on which it may be brought here, (Burrough, J. No. In French v. Finn, the pearls were sent out on an express contract to be sold, and though the sale was after the bankruptcy, the contract was before the bankruptcy. In Smith v. Holson, the assignees might have brought trover; and the whole judgment in that case goes to show that if the action had been so shaped, the assignees might have recovered. (tilbh). C. J. The judgment of the court, in Smith v. Hodson, as to the probable success of the assignees, if they had brought trover, goes on the ground of fraud and undue preference, with which that case was tructured.) The language of the courts, in Expande Deese, French v. Fenn, and Olive v. Smith, is clear to show that the form of action can make no difference; and the plaintiffs (a) are not to be shut out from the benefit of the rule so broadly laid down and so strongly confirmed, because this is the first action of trover for goods in specie on which the point has arisen.

Cur. adv. vult.

And now, the case having stood over till this day, Gibbs, C. J., delivered the judgment of the court.

This was an action of trover for cloths left by Smart, before his bankruptey, with the defendant, who was a fuller, to be dressed.

There was then a balance due from the bankrupt to the defendant for work done on other cloths.

The assignees tendered to the defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the defendant refused to deliver them up, unless he was paid his general balance.

The question was, Whether he were entitled to retain them for that balance? And Mr. Justice *Holroyd*, before whom the cause was tried, at the Spring assizes for Salisbury, 1817, reserved the point for the opinion of the court; and we are of opinion that the defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance.

⁽a) Sic in the report, but ought to be defendant.

He founds his claim on the ground of mutual credits, mentioned in stat. 5 Geo. 2, c. 39, s. 28, and the construction which has been put upon that statute.

The case Ex parte Deeze (a), is not distinguishable from the present. There, a packer claimed to retain goods, not only for the price of packing them, but for a sum of 500% lent to the bankrupt on his note; and Lord Hardwicke determined that he had such a right, on the ground of mutual credits, to which he gives a very extensive effect, and says that the clause relative to them has always received a very liberal construction.

This doctrine, if it were supportable, would apply directly to the present case, and would establish the defendant's right to retain for his general balance.

But, in the case Ex parte Ockenden, which came before Lord Hardwicke about six years after the former, he very much narrows the extensive construction that he had before put on the words "mutual credits," in the statute 5 G. 2, c. 30, s. 28, and determines in express terms, that a case like the present does not fall within them.

That the cases Ex parte Deeze and Ex parte Ockenden are accurately reported by Atkyns, we have the authority of Lord Mansfield, in Green v. Farmer (b), who confirms them by his own notes.

It appears, therefore, that the final opinion of Lord *Hardwicke*, after a very full consideration of the subject, would exclude the present case from the protection of the statute as a mutual credit, though he admits that the words "mutual credits" have a larger effect than mutual debts, and that under them many cross claims may be allowed in cases of bankruptey, which in common cases would be rejected.

I am not aware of any later decision upon this subject, until the case of *French and another*, *Assignees of Cox*, v. *Fenn*, which occurred in the year of 1783, and is very fully and correctly reported in Cooke's Bankrupt Laws (c).

Cox, the bankrupt, was indebted to Fenn, and had entrusted him with his share or interest in a string of pearls, to be sold by Fenn, and the profit on such share to be paid to Cox. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for his share of the profit. On the part of the defendant it was insisted that there was a

mutual credit, though not a mutual debt, at the time of the bankruptey, and that one could not be demanded without satisfying the other.

The doctrine of Lord Hardworks in Exparts Deers was relied on by the counsel, and seemed to be fully adopted by the court, without adverting to the qualification which it received from the case Exparts Orden len; and applying the decigne to the case before them, they determined that Fenn was protested from the claim of Cox's assignees by the clause of mutual credits.

French v. Fenn has been followed by a string of causes, running through a period of more than thirty years, all professing to depend upon it, some of them containing the fullest approbation of Exparte Deeze from the Bench.

Whatever I might think of the original decision, I could not persuade myself to break in upon a class of cases so long established; and if they could not be supported without carrying the doctrine found in E_{IJ} per e D error to its fullest extent, speaking for myself, I should be ready to follow it, rather than overturn all that has been settled upon this subject for such a length of time.

But it is first to be considered whether these cases may not be supported by a construction of the statute which will not go to that extent, and will be use the opinion of Lord *Hardwicke* in the case of *Ex parte Ockenden* untouched.

By the 28th section of 5 G. 2, c. 30, it is enacted, "that where it shall appear to the said commissioners, or the major part of them, that there hath been mutual credit, given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time balore such person became bankrupt, the said commissioners, or the major part of them, or the assignces of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed on either side respectively."

Something more is certainly meant here by mutual credits than the words mutual debts import; and yet, upon the final settlement, it is enacted merely that one debt shall be set against another. We think this shows that the legislature meant such credits only as must in their nature terminate in

debts; as where a debt is due from one party, and credit given by him on the other hand for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other: in such case the credit given by the delivery of the property must in its nature terminate in a debt the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute.

This principle will support all the cases from French v. Fenn to Olive v. Smith, which is the last that has occurred.

In *French* v. *Fenn* there was a debt due from Cox to Fenn, and Cox entrusted Fenn with his share in the pearls *for sale*, which when sold would constitute a *cross debt* for the produce from Fenn to Cox.

In Smith v. Hodson (a), the defendant had entrusted the bankrupts with his acceptance, which he was liable to pay, and which when paid would create a debt from the bankrupts to him for the amount.

In Parker v. Carter, Co. Bankrupt Laws, 548, and Olive v. Smith, the bankrupts were indebted to the defendants, and the bankrupts delivered policies of insurance to the defendants to collect losses under them, which, when collected, would make the defendants their debtors for the amount.

So, in all the other cases which have occurred upon this subject, it will be found, that that which has been allowed as a mutual credit has always been of such a nature as must terminate in a *cross debt*.

To this extent we think the statute may be carried, but no further; and we follow the final opinion of Lord *Hardwicke*, in determining that the delivery of these cloths to the defendant, for the purpose of being dressed, does not form an article of mutual credit in his favour within the fair construction of the clause relied on.

The postea must therefore be delivered to the plaintiffs (b).

⁽a) 4 T. R. 211.

⁽b) Dallas, J., was absent from illness, but concurred in this judgment, ex relatione Gibbs, C. J. See Samp-

son v. Burton, 2 B. & B. 89, particularly the judgment of Burrough, J.; and, in p. 96 of that report, for "1818" read "1817."

The doctrine of set off in Bankruptey is shown by Mr. Caristias to have existed from a very early period, certainly before st. 4. Anno e. 17. In which it first received the express see from of the legislation. See 14.0, 169. Lem. 1 Mod. 215. Chapman v. Perky, 2 Vern. 117. Lead to make to this Garnett Gallo Mining. 4. Co. v. S. Man., 2 L. J. Q. B. C. The perlies of allowing a set off between meness due to and from the tentropt's color is precisely the same as that in which the law relative to stapped in Principle originated. It is to prevent one man's dolts from being padd with another man's money which would take power if a man being at once the debter and creditor of the bankrupt were forced to pay the whole of his debt to the estate, and to receive only additional.

That where there has been enutual and it given by the backrupt and any other persons or where there are not out in the backrupt and any other persons the court shall state the account between them and one delicated decreased that it is such an adder a backrupt and any be set against another as backrupt and the region of the analysis of the delicant replay consisted by him, and what shall appear due on either side on the bottone of such account, and no more, shall be altimed or read on either side in the bottone of such account, and no more, shall be altimed or read on either side respectively; and every delit or demand here by muck provided against the estate of the bankrupt, may also be set off in integer a threshold against such estate, provided that the person claiming the benefit of size set of hind not, what could was given, notice of an exist bankrupt, by such bankrupt committed. This section was a resonactment of a 50 of the 6 to 4 to 16 the word "court" being substituted for the word "commissioners"), and the cases therefore upon the earlier act still continued to be authorities as to the construction of the later.

This section was in its turn repealed, and s. 39 of the Bankruptev Act. 1se), substituted for it, which latter section is now replaced by s. 3s of the Bankruptey Act, 1883, 46 & 47 Vict. c. 52, the enactment now in force. The words, however, are practically identical with those of the late Act. They are as follows:—

[&]quot;Where there have been mutual credits, mutual debts, or other mutual

dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him." With the addition of the words "mutual dealings," which were first introduced in the Act of 1869, and the effect of which will be considered hereafter, this section, like its predecessor, is substantially a re-enactment of the previous acts, as interpreted by judicial decisions, and the cases, therefore, upon questions of mutual credit under the earlier acts continue for the most part to be authorities upon the present law. Though the words of the earlier Acts, "notwithstanding any prior act of bankruptcy," are now omitted, an implication equivalent to them arises from the rest of the section; see Elliott v. Turquand, 7 App. Ca. at p. 86.7

Notice of the act of bankruptcy is now therefore, [as formerly,] the dividing point at which the right of set-off terminates; and consequently it has been held, that a person who after bankers had actually stopped payment, industriously collected their notes for the express purpose of setting them off against a debt due from himself to the firm, should be allowed to do so, as he had no notice of any act of bankruptcy actually committed by either of the partners, Dickson v. Cass, 1 B. & Ad. 343, accord. Hawkins v. Whitten, 10 B. & C. 217. But it was held in the same case that he could not set off notes which he had taken after he knew that some of the partners had committed acts of bankruptcy; and see Exparte Snowball, L. R. 7 Ch. 534, 41 L. J. Bkcy. 49, as to what circumstances will be taken to amount to notice.

It will be observed that the language of the present section is "notice of an act of bankruptcy, available against him." Having regard to the provisions of s. 6, these words would appear to limit the necessity for notice to acts of bankruptcy occurring within three months of the presentation of the petition. Such was the construction put on the similar expression in ss. 94 and 95 of the late act, *Ex parte Gilbey*, 8 Ch. D. 248.

Under the 12 & 13 Vict. c. 106, s. 171, there [were,] it will be observed, two classes of cases in which the right of set-off [was] expressly given. 1. Where there were mutual debts. 2. Where there had been mutual credits. It is upon the second of the above two classes that Rose v. Hart, [has been] a leading authority. It [has been] cited when the question [has] occurred,—does a particular state of dealings amount to a mutual credit between the bankrupt, and some person claiming to set off a cross demand against his estate?

The first case bearing upon this question was Ex parte Prescott, 1 Atk. 230, where the claimant owed the bankrupt a debt, payable in futuro, and the bankrupt owed him one payable in præsenti. Lord Hardwicke said, that this constituted, not indeed a mutual debt, but a mutual credit. The cases soon multiplied; and it was settled, that, in order to render credits mutual, within the meaning of the bankrupt laws, it was not necessary that the bankrupt and the creditor should particularly intend to trust each other, or to raise cross demands. This was settled in Hankey v. Smith, 3 T. R. 507, n., where

A.'s acceptance got into B's hands, and B bought goods of A., who did not know that the bill was in B.'s bands

After Lord Hardwicke had, in $Ex_perte\ Present$, pointed out the distinction between mutual debts and mutual credits, the latter term was frequently relical on, and there was a struggle to bring within its meaning many demands which could not possibly have ranged within the former term. It has been seen from the discussion in the text, that in $Fx_perte\ Decker(1)$ Atk 228, these words received a very large construction; which was narrowed by $Fx_perte\ Decker(1)$ Atk. 234; and that these cases were followed by a string of decisions, beginning with $French\ v.\ Fenn,\ Co.\ B.\ L.,\ 7th\ ed.\ 536,\ A.D.\ 1783,\ and extending over a period of more than thirty years, during which <math>French\ v.\ Fenn$ was the leading case upon this subject.

At last, in 1818, Rose v. Hart was decided, and the rule established which [has ever since prevailed], namely, "that me to decreates, within the meaning of the bankrupt laws, are excelles which must in their nature term note in deless."

And this it is submitted means, not, as has been contended in some cases, credits which must, ex necessitate rel, terminate in debts, but credits which have a natural tendency to terminate in debts, not in claims differing in nature from a debt. Thus it was settled in 8 with v. H. dism., 4. F. R. 211, that an accommodation acceptance is a credit given by the acceptor to the party accommodated; and yet it is not certain to end in a debt, for the party accommodated ought to provide for the bill at maturity, and, if he do, there will be no debt: [Yotes v. H. 179, 2. C. B. 54]

The cases between From h v. From and Russ v. Hart were all recognised by the latter case, and stated by the Lord United Justice to be reconciletile with, and supported by, his decision. It will [therefore] be necessary to review them before proceeding to the cases subsequent to Rose v. Hart. The case of French v. From itself is well abruiged by the Lord Chief Justice in the text, and is well epitomised by the same learned judge, while at the bar, in his argument in Smith v. Hodson, ante, p. 138, so that it is unnecessary to repeat the facts here at full length. It is a very remarkable case, and was long the leading decision on this subject; and, excepting the overruled case of Expante Decze, and the later decision of Expany v. United post goes perhaps further than any case upon this branch of the bankrupt laws. Smith v. Hodson, 4 T. R. 241, is reported at length in this volume, being the leading case upon another equally important point. As far as it bears on the present subject, it was expressly approved of by the court in Habase v. Maggloston, 3 M. & W. 20.

In Alkinson v. Elliott, 7 T. R. 378, the defendant sold the bankrupt a parcel of tars for 430l, at six months' credit, for which the bankrupt accepted a bill, and afterwards bought another parcel for 250l on the same terms. On the first bill becoming due, he gave the defendant two bills on third parties, making together 600l, and the defendant undertook on their being paid, to return 170l, it not being intended to do more than take up the bill accepted for the price of the first parcel. In an action for the 170l, the defendant was allowed to set off his demand for the second parcel of goods.

In Ex parte Boyle, re Shepherd, 15 Aug., 1803, Co. Bank. L., 8th ed., 571, Lord Cork, to accommodate Shepherd, who was his solicitor, drew four notes, two payable to Nibbs or order, and two to Shepherd or order, making, in the whole, 981/, 08, 36/. Lord Cork, having been forced to take up one of them before the bankruptcy, and two afterwards, the question was, whether these payments could be set off against a debt due from his lordship to Shep-

herd's estate. The Lord Chancellor at first thought that the account must be taken as it stood at the time of the bankruptcy, and that the debt could not be set off against the mere liability on which no payment was made till after the bankruptcy: but afterwards his lordship said he had considered the case, and was of opinion, that the petitioner was entitled to set off the debt against the payments after the bankruptcy.

That an accommodation acceptance, not paid till after the bankruptcy by the acceptor, could be set off against the estate of the party accommodated, was also decided in *Ex parte Wagstaff*, 13 Ves. 65; and these cases were cited with approbation by Parke, B., in *Hulme v. Muggleston*, 3 M. & W. 30.

In Sheldon v. Rothschild, 8 Taunt. 156; 2 Moore, 43; Otte drew a bill on B. & Co., for 400l., which they accepted without value. They afterwards owed Otte 236l. 11s. 3d., and drew on him for 163l. 8s. 9d., the balance. This bill they sold to the defendant, and afterwards became bankrupts, the 400l. bill remaining in Otte's hands unpaid. Otte accepted without notice of the bankruptcy, and paid the 163l. 8s. 9d. to the defendant, on which, the assignees of B. & Co. brought an action as for money had and received; but the court held that there was a mutual credit between the bankrupt and Otte, and that, inasmuch as he could have set off his demand on the estate in any action brought against him, the defendant, whom he had indemnified, and who stood in his place, might do so also.

The next decision is the principal one of *Rose* v. *Hart*, which is reported in the same volume with *Sheldon* v. *Rothschild*, the Lord C. J. Gibbs, who had argued, when at the bar, in *Smith* v. *Hodson*, delivering the judgment, which was one of the last pronounced by that distinguished judge. This case settled the law upon the subject; the subsequent decisions turning all of them on the applicability of the rule, promulgated in *Rose* v. *Hart*, to particular states of fact.

A very remarkable case on this part of the bankrupt law in Easum v. Cato, 5 B. & A. 861, in which the doctrine of mutual credit was perhaps carried further than in any case subsequent to Rose v. Hart. In Easum v. Cato, J. S., being desirous of making a shipment at his own risk, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were A.'s; and procured A. to write to them to insure, and make advances on the goods, which was done. J. S. having become a bankrupt, it was held, that A. might recover the proceeds of the goods, and set off a debt due to himself from J. S. in an action for them by the assignees; vide tamen Young v. Bank of Bengal, 1 Deacon, 622; Moore's Priv. C. Ca. 150, a case the decision of which it is perhaps not easy to reconcile with Easum v. Cato.

In that case P. & Co. obtained advances from the Bank of Bengal, depositing negotiable securities and giving promissory notes, with an authority to the Bank to sell the securities at the end of three months for their reimbursement rendering back any surplus to P. & Co., who undertook to make up the deficiency, if any. P. & Co. became bankrupts, and the Bank having sold the securities and realised a surplus, the question arose whether under clauses precisely similar to those of the English Bankrupt Act there could be a set-off between it and another independent debt due from P. & Co. to the Bank. The Supreme Court of Bengal (dissentiente the Chief Justice) held that there might; but the decision was reversed in the Privy Council, and the judgment does not purport to be founded on the special promise to repay the surplus, but on the uncertainty at the time of the bankruptcy whether there would

ever be a debt capable of being set off arising from the sale of the securities.

Young v. Brink of Revert was much commented on in the ger v. Core. §2 M. & W. 751. In that case Baron Parke places the decision on two grounds. Ist. that there was no mutual credit, as the securities find there is with the bank if r = recentler r, p = recentler and that it was the dark of the assignees to redeem the paper immediately, and if they had done so the data would have been due in respect of the loan.

In Numera v. Chartered Bank of Index, L. R. S.C. P 444 the plantiffs who were in the habit of drawing bills on parties in India, and whose opening it was to entrust these bills to the defendants for the purpose of call other, had executed a deed of inspectorship under the Bankruptcy Act, 1861. At the date of the deed, the plaintiffs were indebted to the defendants in a sum of 8555/ In an action brought by the plaintiffs to recover a sum of money, the proceeds of bills entrusted to the defendants for collection, of which a small portion only had been received by them before the date of the deed, it was held, distinguishing Young v Bonk of Bong d, that inasmuch as the authority to collect the bills had not been revoked at the time of the execution of the deed, there was a mutual credit under section 171 of the late Act, so as to entitle the defendants to set off the sum due to them against the plaintiffs' claim for the proceeds received after, as well as for those received before the date of the deed. There is an error in the head note of this case in the L. R., as it is there stated that, at the date of the deed, the sum sued for was actually collected and in the hands of the defendants, in which case no question of mutual crobb could have arisen; see the report in 1s L. T. N. S. 358, where the case is fully set out. See also Asticy v. Gurmy, L. R. I.C. P. 714, where a similar question was discussed in the Exchequer Chamber, and Flliott v. Turquand, 7 App. Cas. 79, 51 L. J. P. C. I, in the Privy Council

In Groom v. West, 8 A. & E. 758, an agreement to pay the bankrupt for goods sold prompt two months, or by acceptance, was held a claim against which a debt due from the bankrupt might be set off.

The nature and extent of the rule laid down in Rose v. Hart are well illustrated by the two cases of Rose v. Sims, I.B. a. Ad. 521, and tribson v. 1504, I.Bing, N. C. 748; in the former of which it was held, that an agreement to indorse a bill of exchange did not create such a credit as the statute intends; in the latter, that an agreement to more if a bill did create such a credit. These cases turned on the distinction between an acceptance, which creates a debt, and an indores ment, which creates only a suretyship. See Wallis v. Swinburne, I Exch. 203.

In Hulme v. Muggleston, 3 M. & W. 30, to an action for money had and received to the use of the assignces of John Smith, the defendant pleaded that hefore notice of the backruptey, he indorsed a bill for Smith's accommodation, and discounted another for him, both of which he was obliged to take up after the bankruptey; that hefore the bankruptey, Smith lent him a cheque, the proceeds of which he received after the bankruptey, which was the same money now sued for, and against which he claimed to set off the amount of the dishonoured bills. The court held the plea good. To the same effect is Russell v. Bell, 8 M. & W. 277, which is not quite so strong a case as Hulme v. Muggleston, the credits being accommodation acceptances, as in Smith v. Hodson, instead of indorsements, as in Hulme v. Muggleston.

In Bigglestone v. Timmis, 1 C. B. 389, the Court of C. P. held that a demand which originated before flat, and before notice of any act of bankruptey,

could be set off against a claim for money had and received to the use of the assignees, arising out of a credit given by the bankrupt before fiat, and before notice of any act of bankruptcy.

In Collins v. Jones, 10 B. & C. 777, it was laid down by Bayley, J., that "whoever takes a bill must be considered as giving credit to the acceptor; and whoever takes a note, credit to the drawer." See Arbouin v. Tritton, Holt, 608; Edmeads v. Newman, 1 B. & C. 418. In Belcher v. Lloyd, 10 Bing. 316, a distinction was engrafted on the above rule; namely, that the holder of the bill or note, to be within the statute, must not be a mere agent holding it for the benefit of a third person. In that case, Maberly's assignees sued Lloyd & Co., acceptors of a bill for 1000/. drawn by the Commercial Banking Co., and indorsed to Maberly. When Maberly became bankrupt, Lloyd & Co. had in their hands a bill for 7601., drawn by a firm in which Maberly was a partner, accepted by a firm in which he also was a partner, and indorsed by the Commercial Banking Co. This bill became due on the 6th of January, the day on which Maberly stopped payment, whereupon Lloyd and Co. protested it; and having in their hands sufficient assets of the Commercial Banking Co. to discharge it, debited the company with the amount, and sent them the protested bill, with a receipt for it. The Commercial Banking Co. sent back the bill, requesting Lloyd & Co. to set off its amount against their own acceptance for 1000l.; and the question was, whether they had a right to do so. The court held not. "Can it be said," asked Mr. J. Bosanquet, "that the defendants are creditors of Maberly, and hold the bill on their own account? If not, and if they hold the bill as mere trustees for the Scotch house, as such trustees they are not entitled to set it off against a demand made on themselves in their own right."

Similar to this decision was Lackington v. Combes, 6 Bing. N. C. 71, where to an action by the assignees for the price of a phaeton, which had been sold by the bankrupt to the defendant, on ready-money terms, the latter endeavoured to set off a dishonoured acceptance of the bankrupt, in which he had no real interest, but which he had obtained from the holder for that purpose. It was held that he was not at liberty to do so. See Fair v. M'Iver, 16 East 130; Foster v. Wilson, 12 M. & W. 191; [London, Bombay, &c., Bank v. Narraway, L. R. 15 Eq. 93].

That the demands, in respect of which a set-off is claimed, must be in the same right, is established by several cases. See West v. Pryce, 2 Bing. 455; Ex parte Whitehead, 1 G. & J. 39; Wood v. Smith, 4 M. & W. 525; Stainforth v. Fellows, 1 Marsh 184; [New Quebrada Co. v. Carr, L. R. 4 C. P. 651]. Thus in Groom v. Mealey, 2 Bing. N. C. 138, where to an action for money had and received to the use of the assignees, the defendant pleaded a set-off of money due to him from the bankrupt, it was held ill on demurrer. See also Yates v. Sherrington, 11 M. & W. 42, where to an action by the assignees on a note not payable to order given to the bankrupt's wife dum sola (supposing the action to be maintainable, which it was afterwards holden by the Exchequer Chamber not to be), it was held that a debt due from the bankrupt in his own right could not be set off. S. C. in error, 12 M. & W. 855; [and see Bailey v. Finch, L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; Sankey Brook Coal Co. v. Marsh, L. R. 6 Ex. 185; 40 L. J. Ex. 125; Bailey v. Johnson, L. R. 7 Ex. 263; 40 L. J. Ex. 189; Ex parte Morier, 12 Ch. D. 491.

In Alloway v. Steere, 10 Q. B. D. 22, 52 L. J. Q. B. 38, where a bankrupt's trustee had not disclaimed a tenancy, and so became liable as assignee on the covenants in the lease, and at its expiration had claimed, as he was entitled

to do, the value of tillages from the landlord, it was held under the late act that the latter could not set off the amount of rent due at the date of the bankruptcy from the bankrupt.

The peculiar right of set-off founded on the mutual credit cause of the bankrupt acts, exists in case of a bankruptey only as between the trusteef of the bankrupt and the debtor to the estate. It cannot be made available in an action brought by the bankrupt as trustee for a person to whom he has assigned his equitable interest before the bankruptey, Boul v. Mungles, 16 M. & W. 337.

[The provisions, however, of the Judicature Act, 1873-36 & 37 Viet. c. 66], and Judicature Act, 1875-38 & 39 Viet. c. 77., O. XIX r. 3. as to the right of set-off have had the effect of rendering set-off in actions much wider than it was formerly in bankruptcy. See O. XIX. r. 3.]

It is also necessary that the mutual credit should exist at the time of the bunkruptcy, Dickson v. Evous, 6 T. R. 57. Box v. Manufes, v. supplied see per Martin, B., Bailey v. Johnson, L. R. 6 Fx. 284, subject however to an exception in the case of secret acts of bankruptcy, for though the section of the present act, like that of the former, does not define the time for taking the account, it may at all events be taken up to the time when the party claiming the benefit of the clause has notice of an act of bankruptey. Estatt v. Forguand, 7. App. Cas. 79, 51 L. J. P. C. L. On the other hand, except in the case of a secret act of bankruptcy, the line as to set-off must be drawn at the commencement of the bankruptcy; and, therefore, a creditor of the bankrupt cannot set off his liability on a bill accepted by him with notice of the bankruptcy against his own claim on the bankrupt's estate. In re-ballespie, Expante Reid, 14 Q B. D 963, 24 L J Q B 342 Sec also In re-Millan Tramwans, 25 Ch. D 587, 53 L. J. Ch. 1998. It was formerly held that no set off by way of mutual credit could be pleaded to a claim by the assignees of a bankrupt resulting from the misappdication by the delimit of money placed in his hands by the bankrupt for the purpose of meeting his acceptances, such claim having been held to be for unbquidated damages. Bell v. Corey, 8 C. B. 887; Hill v. Smith, 12 M & W 618 See now, however, Limith v. Hutchinson, L. R. 15 Eq. 30, abstracted refer. A claim in respect of a loss on a policy of insurance might even under the former statutes, before adjustment, have been set up as a matual credit, although it is not a debt within the statutes of set-off. Beckwith v. Bullon's E & B Gal; see also Koster v. Eason, 2 M. & S. 112; Parker v. Beasley, the 423; and Lee v. Ballen, S. E. & B.

It must be borne in mind, that any demand proveable under the flat might, by the express words of the 6 Geo 4, c. 16 s. 50 be set off. On the other hand, a demand could not be set off that would not have been proveable under the flat. See Abbott v. Hicks, 5 Bing N. C. 579. A. B. & C. dissolved partnership, the firm owing H. 51.891/12s, and A. owing the firm 6.817/, 9s. 8d., it was agreed that A. should pay B. & C. the 6.817/19s. 8d., and that B. & C. should keep the stock and assets of the firm, and should pay H.: B. & C. became bankrupts while 47,000/L remained still due to H. Held that A. could not set-off his liability to pay this sum in an action against him by the assignees. G. If," said Mr. J. Erskine, G. in consequence of the bankruptcy he had paid the whole to H. he might have proved under the commission, and any debt or demand proveable under the commission may be set off where there has been mutual credit. But, here, as there has been no payment, there is no debt or demand, and the defendant has given no credit to the bankrupts, nor is this

one of the contingent debts provided for by sect. 56, on which the commissioners are to put a value in order to proof. It is no debt at all, and as the defendant may never be called on to pay it, it would be impossible to put a value on it. — This is not a debt payable on a contingency, but a mere liability which may or may not become a debt hereafter."

It will have been observed that the conclusion of the 171st section [of the act of 1849] which section correspond[ed] as we have seen, with sect. 50 of the 6 G. 4, c. 16, enacted [in similar terms] that every debt or demand made proveable against the bankrupt's estate might be set off.

[The right of proof against the bankrupt's estate was successively extended so as to embrace various kinds of contingent liabilities by 6 Geo. 4, c. 16, ss. 51 and 56; 12 & 13 Vict. c. 106, ss. 172 and 173; 24 & 25 Vict. c. 134, ss. 153 and 154, and 32 & 33 Vict. c. 71, s. 31, all of which are now repealed. The right of proof is now governed by sect. 37 of the Bankruptcy Act, 1883, which is so wide in its terms as to include every possible liability arising out of a contract. See Ex parte Llynvi Coal Co., L. R. 7 Ch. 28; Ex parte Peacock, L. R. 8 Ch. 682; Ex parte Waters, L. R. 8 Ch. 562; Ex parte Blakemore, 5 Ch. D. 372; Ex parte Bolland, re Winter, 8 Ch. D. 225, 47 L. J. Bkcy. 52, upon the scope and interpretation of the similar section of the act of 1869.

It remains to consider what effect, if any, has been produced by the introduction of the words "mutual dealings" in the present and last previous enactments. In *Booth* v. *Hutchinson*, L. R. 15 Eq. 30, which was the case of a deed incorporating the provisions of the Bankruptcy Act, 1869, it was held that a claim for damages for breach of covenant which were unascertained at the date of the deed might be set off against the claim for rent due and accruing due to the insolvent estate up to the time of the distribution of the estate under the deed.

In delivering judgment, Malins, V.-C., said, "If the case were under the old law I should probably have concluded that there was no right of set-off, but the old decisions rested on the construction which the courts had put upon the words 'mutual' and 'mutual credits.' The language of the act of 1869 is altered from that of previous acts and made more comprehensive; and I must therefore conclude that the right of set-off given by the previous acts was considered to be too restricted, and was intended to be en-That such was the intention of the legislature is rendered more probable by the very wide terms of the sections of the present and former enactments (37 & 31) as to proof of debts. For although those sections do not, like sect. 171 of the act of 1849, provide in express terms that every proveable demand may be set off, yet since every liability arising out of contract is now capable of proof, and is consequently barred by the bankrupt's order of discharge (see sect. 30), to hold that the right of set-off is narrower than the right of proof would bring about the anomalous result, to meet which the doctrine of mutual credit was introduced (see ante, p. 333). For the creditor would be precluded from setting off claims which he would nevertheless be debarred from asserting by action, and would therefore be obliged, while paying his own debt in full, to receive back from the bankrupt's estate a dividend only in respect of such liabilities of the bankrupt towards himself; but see Ex parte Price, In re Lankester, L. R. 10 Ch. 648, a case decided upon the peculiar nature of the valuation put upon the claim of a policy-holder in the winding up of an insurance company. The policy-holder had himself gone into liquidation, being indebted to the insurance company.

On proof by the liquidators of the company against the estate of the debtor, it was held that the trustee could not set off the estimated value which had been put upon the policy. In Exporte Barnett, is relieved L. R. 9 ch. 2015, which was decided upon the late act. Lord Solburne, C. guards himself from expressing an opinion upon the effect of the additional words. In that case, Barnett & Co. had had business transactions with a trader who became bank-rupt, and at the time of the lank-ruptey the bankrupt owed Barnett & Co. 3 010%, and Barnett & Co. owed the bankrupt ssl., in respect of which sum he had a lien upon goods of Barnett & Co. in his possession. On a claim by the trustee in bankruptey that Barnett & Co. should pay the 88% In full, and should prove for the whole sum of 1010% against the bensampts estate. It was held that the latter were entitled to have the sum of 88% set off against their claim, so as to free the goods from the lien, and to prove for the balance against the bankrupt's estate.

However in Expanse Bolland is Water's Ch D 225, 47 L J Bkey 52, Bacon, C. J., put a somewhat narrower construction on the act. In that case, a contractor failed to carry out his contract and had gone into liquidation There was a clause in the agreement compowering the employers to use the plant left by the contractor on the premises in case of his default, and a portion had accordingly been used up by a contractor duly substituted under the contract. The balance remaining unused was sold by agreement, and the sum realised was claimed by the trustees. The employers sought to set off the damages sustained by them through the breach of contract, contenting that there had been mutual dealings between them and the debtor, in respect of which they were entitled to the set off. This content on the learned judge overruled, being of opinion that inasmuch as the employers acquired no property in the plant, but only a right to use it in a certain event, there had not under the circumstances been a dealing in respect of the sum realised. In Peat v. Jenes, 8 Q B D 147, 31 L J Q B 128 the Court of Appeal followed Booth v. Hat hinson in holding the clause applicable to a claim for unliquidated damages, and held that such a claim might be set off in a conmon law action brought by a trustee in liquidation. In Jok v. Kippingt, 9. Q. B. D. 113; 51 L. J. Q. B. 463, it was held that a claim for fraudulent misrepresentation on the sale of a chattel by a bankrupt may be set off against a claim by the trustee for the price.

The set-off under the section is not optional but compulsory, and it would seem that the existence of security does not affect its operation. Le parti-Bernott, supra; and see We Kinney v. Lemstree v. 2 App. Cas. 5.31.

Sect. 10 of the Judicature Act. 1875, imports the rule of set-off, with the other rules in force for the time being under the law of bankruptey as to debts and liabilities proveable, into the administration by the court of the assets of persons whose estate is insufficient for the payment of their debts, and into the winding up of companies. See Mersoy Stort, &c. Co. v. N 12 c. 9 App. Ca. 434

The history of this head of the bankrupt laws down to that date is so clearly, and at the same time briefly, sketched by Lord Chief Justice Timal, in his judgment in the case of tailsoon v. Ball, 1 Bing. N. C. 753, that this note cannot be better concluded than by extracting it.

"The principle," said his lordship, "which the bankrupt laws seem to have had in view, from the earliest times to the last provisions made therein is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between

them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt, long before any statutory provision on the subject, appears clear from the two earliest decided cases, Anonymous, 1 Mod. 215, before Lord Chief Justice North, and Chapman v. Derby, 2 Vern. 117. The first statute which made any express provision on the subject was the expired statute 4 & 5 Anne, c. 17. By that statute it was enacted in the eleventh section, 'that where there had been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners, or assignees, to adjust the account; and the debtor shall not be compelled to pay more than shall appear to be due on such balance.' This provision of the expired statute of Anne is re-enacted in the twenty-eighth section of 5 G. 2, c. 30, with some variation in the expression, that section enacting, that 'the commissioners, or assignees, shall state the account between them, and one debt may be set against another, and what shall happen to be due on either side, on the balance of such accounts, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.' This statute continued in force until the 46th G. 3, c. 135, s. 3, which provides, that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed.' The same language is continued in the last statute, 6 G. 4, c. 16. So that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated, as between merchant and merchant; and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off."

SET-OFF is the setting up a demand by the defendant to counter-balance that of the plaintiff in whole or in part; 2 Bouv. Dict. 515; Avery v. Brown, 31 Conn. 398, 401; Kingman v. Draper, 14 Bradw. 577. It is often called a cross-action rather than a defence; Mitchell v. McLean, 7 Fla. 329; Everson v. Fry, 72 Penn. St. 326; Curran v. Curran, 40 Ind. 473; Lewis v. Denton, 13 Iowa 441. According to the common law "mutual debts were distinct and inextinguishable except by actual payment or release;" Commonwealth v. Clarkson, 1 Rawle 291. Although it is stated that at common law "the right of set-off is limited to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other;" Hurlbert v. Pacific Ins. Co., 2 Sumn. 471, 477.

The first statute authorizing set-off in England was that of 2 Geo. 2 Ch. 22, made perpetual by that of 8 Geo. 2 Ch. 4. Similar statutes have been passed in all or nearly all of the states of the Union. The decisions of the courts cannot be always harmonized, as their purpose is frequently to interpret the statutes. There are main points, however, upon which

there is little or no disagreement. An early New Jersey statute on set-off is referred to in The C. B. Sanhard, 22 Fed. Rep. 862.

How far the claim must exist - It must be due and purable at the time of the commencement of the plaintin's action; Islang r. Bowden, S. Eveli, 852; Martin r. Kanamuller, 37 N. Y. 396; Henry v. Butler, 32 Conn. 140; Robinson v. Safford, 57 Me. 163. An unmatured debt cannot be set off; Whit dur v. Turnbull, 18 N. J. Law 172. See Houston v. Fellows, 27 Vr. 634; Tessier v. Englehart, 18 Neb. 167; Gumus v. Cluft, 111 Penn. St. 512; McLachlin w Brett, 105 N. Y. 391; Ellis c. Cothran, 117 Hil. 458; Wood v. Brush, 72 Cal. 224; Patterson v. Wright, 64 Wis. 289. The same rule applies to a counter-claim; Kramer v. Electric Light Co., 95 N. C. 277. And to a demand in equity; Reppy c. Reppy, 46 Mo. 571. It has been held that a present claim against an insolvent estate may be set off when the debt against which the setsoff is claimed matured after deceased insolvent's death; Skiles v. Honston, 110 Penn. St. 254. But see "Demands against executors and administrators," infra. Generally, in the absence of statute, the claim which is the subject of setsoff must grow out of the transaction. See . Bullock v. Horn, 44 Ohio St. 420; Beecher v. Baldwin, 55 Conn. 419; Ford v. Burchard, 130 Mass. 424.

Torts and replevin. - Damages from torts cannot be set off at law or in equity; Shelly v. Vanarsdoll, 23 Ind. 543; Harris v. Rivers, 53 Id. 216; Hall's Appeal, 40 Penn. St. 409; Matthews v. Lindsay, 20 Fla. 962, 977; Vaneleave v. Beach, 110 Ind. 269. One trespass cannot be set off in bar of another; Hargreaves v. Kimberly, 26 W. Va. 787, 800; Shelly v. Vanarsdoll, supra. Damages sustained by annoying suits, malicious prosecutions, slander of title, injury to one's credit occasioned by such proceedings, though relating to the subject-matter of plaintiff's suit cannot be set off; Matthews r. Lindsay, supra. A demand arising from tort, cannot be set off against one arising out of contract; Indianapolis R. R. Co. r. Ballard, 22 Ind. 448. See Hall v. Penny, 13 Fla. 621; Hudson v. Nute, 45 Vt. 66; Street v. Bryan, 65 No. Car. 619. But damages may be set off in certain cases where the statutes so provide or the setoff is, perhaps, claimed as a remedy after the nature of recoupment; Campbell v. Fox, 11 Iowa 318; Bulkeley v. Welch, 31 Conn. 339; Roethke v. Philip Best Brewing Co., 33 Mich. 340; Thompson v. Congdon, 43 Vt. 396; Norden v. Jones, 33 Wis. 600.

In replevin, a set-off is not allowable; Fairman v. Fluck, 5 Watts 516; Blue Valley Bank v. Bane, 20 Neb. 294; Ward v. Anderberg, 36 Minn. 300; McDonald v. McDonald, 55 Mich. 155; Wright v. Quirk, 105 Mass. 44; Stow v. Yarwood, 14 Ill. 424. But in cases controlled by statutes, or where special circumstances apply, set-off is allowable; Bonte v. Hall, 2 Cin. Ohio 33; Home Sewing Machine Co. v. Zachary, 2 Tenn. Ch. 478; Murray v. Pennington, 3 Gratt. 91.

Unliquidated demands. — It is a general rule that these are not the subject of set-off, either at law or in equity; Tracey v. Grant, 137 Mass. 181; Bonaud v. Sorrel, 21 Ga. 108; Montague v. Boston Iron Works, 97 Mass. 502; Casper v. Thigpen, 48 Miss. 635; Hall v. Glidden, 39 Me. 445; The Zouave, 29 Fed. Rep. 296; Gelshenen v. Harris, 26 Id. 680; Hopkins v. Stockdale, 117 Penn. St. 365; West v. Hayes, 104 Ind. 251. Unliquidated damages are when they are not ascertained, or when there are no facts from which the amount may be ascertained by calculation; Robison v. Hibbs, 48 Ill. 408. See Smith v. Eddy, 1 R. I. 476; Corey v. Janes, 15 Gray 543; Stevens v. Blen, 39 Me. 420; Bell v. Ward, 10 R. I. 503; Drew v. Towle, 27 N. H. 412; Smith v. Warner, 14 Mich. 152. But in some states unliquidated damages growing out of contracts are made the subject of set-off by statute. See Gardner v. Risher, 35 Kans. 93; St. Louis R. R. Co. v. Chenault, 36 Id. 51; The Tangier, 32 Fed. Rep. 230; Sheldon v. Martin, 65 Tex. 409; Knott v. Burwell, 96 N. C. 272; Speers v. Sterrett, 29 Penn. St. 192; Robinson v. L'Engle, 13 Fla. 482; Keyes v. Western Vermont Slate Co., 34 Vt. 81; Eads v. Murphy, 52 Ala. 520; Sledge v. Swift, 53 Id. 110.

Law and equity. — The power of allowing an equitable off-set "should be very cautiously exerted, and only in a case where the equity involved is entirely clear and certain. It is never justified, save where other remedies are impossible, and where the demand allowed is put beyond reasonable doubt;" Armstrong v. McKelvey, 104 N. Y. 179, 185. See Merriam v. Childs, 93 Mo. 131. There is a long discussion of the subject of equitable set-off in Nuzum v. Morris, 25 W. Va. 559. See Payne v. Webb, 29 W. Va. 627. Except under particular circumstances, joint and separate debts, or debts accruing in different rights, will not, for the want of mutuality in the cross demands, be set off in equity against each other; Glover v. Hembree, 82 Ala. 324, 327. Equity is frequently resorted to in case of insolvency.

See Campbell v. Conner, 78 Ala. 211; Farris v. Houston, 78 Ala. 250; Galena Raffrood Co. v. Ennoy 116 Ill. 55; Fourth Nat. Bank v. City Bank, 68 Id. 398; Lattlefield v. Albany Banh, 97 N. Y. 581. Sac Spaulding v. Backus, 122 Mass, 553; Selige mann v. Heller Clothing Co., 69 Wis 410. It is said that a setoff may be allowed in equity in the same cases as at law. First Nat. Bank v. Barmum Iron Works, 58 Migh. 124. See Scammon v. Kimball, 92 U. S. 362. See "In case of insolvency," infra. For a case in a United States court which held that a plea of set off which contains a purely equitable defence to an action on a promissory note, cannot be admitted, although such defence would be allowed in the state where the note was made. See Snyder v. Pharo, 25 Fed. Rep. 398. In some states, an equitable claim may be set off in a suit at law; Atwater v. Schenck, 9 Wis. 160; Chandler v. Drew, 6 N. H. 460. In a late case, it was held that although a defendant at law, with a claim not available in secoff, cannot usually be relieved in equity against a solvent plaintlift, yet he can be relieved if the claim arises out of the matter in controversi, or is an agreement so connected therewith, as if observant to destroy the domaid in suit; Baker v. Hawkins, 44 R. L. 359. Many of the cases -especially old ones - draw elaborate distinctions between law and equity in relation to off set, but the principles are largely treated under the subject of "mutuality," infra.

How far claim must be legal. — Demands must be legal: Payne v. London, 3 Bibb (Ky.) 250; Cabiwell v. Caldwell, 2 Bush (Ky.) 446; Chicago Dock Co. v. Dunlap, 32 III. 207. — See Hall v. Kimmer, 61 Mich. 269. — Services to the plaintiff which are a frand upon a third person cannot be set off; Evernghim v. Ensworth, 7 Wend. 326; Callehan v. Stafford, 18 La. Ann. 556. — The part of a divisible demand which is legal may be set off; Rice v. Welling, 5 Wend. 595; McCruncy v. Alden, 46 Barb. 272.

Mutuality. "The claim asserted as a set-off must be held by the party who asserts it, and not by him and another jointly," and so of setting off a several debt against a joint: Proetor v. Cole, 104 Ind. 373, 379; Rush v. Thompson, 112 Id. 158, 162; Griffin v. Cox, 30 Id. 242; Booe v. Watson, 13 Id. 387; Carter v. Berkshire, 8 Blackf. 193; Richardson v. St. Joseph Iron Co., 5 Id. 146; Ingols v. Plimpton, 10 Col. 535; Ryan v. Barger, 16 Ill. 28; Durbon v. Kelley, 22 Ind. 183; Brown v. Warren, 43 N. H. 430; Coates v. Preston, 105 Ill. 470; Clark v. Taylor,

68 Ala. 453. A debt accruing to a person in his individual capacity cannot be set off against a debt due from him as trustee; First National Bank v. Barnum Works, 58 Mich. 124. See Lynde v. Davenport, 57 Vt. 597; Vason v. Beall, 58 Ga. 500; Jones v. Brevard, 59 Ala. 499; Collins v. Greene, 67 Id. 211; Robertson v. Garshwiler, 81 Ind. 463. The principle applies in the case of all mutual accounts; Peine v. Lewis, 64 Miss. 96; Re Cleveland Ins. Co., 22 F. R. 200; Penniman v. Loney, 40 Md. 471. See Perry v. Chesley, 77 Me. 393. But it has been held that a judgment in favor of A. and against B. and C. may be pleaded as an offset to an action by B. against A; Moody v. Willis, 41 Miss. 347; Peyton v. Planters' Compress Co., 63 Id. 410. The converse of the first proposition is generally true, that a separate debt cannot be set off against a joint one; Howe v. Sheppard, 2 Sum. 409; McDowell v. Tyson, 14 S. & R. 300; Bridgham v. Tileston, 5 Allen 371; Wilson v. Keedy, 8 Gill 195. The same rule applies in equity, although subject to exception; Horne v. Sheppard, supra; Brewer v. Norcross, 17 N. J. Eq. 219; Story's Eq. Jur. § 1457. And the rule is at law sometimes qualified by agreement of parties; Perkins v. Hawkins, 9 Gratt. 649; Smith v. Myler, 22 Penn. St. 36, 40. And in cases of insolvency; Phelps v. Reeder, 39 Ill. 172.

In Pennsylvania it has been held that one of two or more defendants may set off his individual claim against the plaintiff's joint claim; Miller v. Bomberger, 76 Penn. St. 78. See Kent v. Rogers, 24 Mo. 306; Dunn v. West, 5 B. Monr. 376. And such set-offs are allowed in many cases by liberal statutes; Threlkeld v. Dobbins, 45 Ga. 144; Redman v. Malvin, 23 Iowa

296; Sledge v. Swift, 53 Ala. 110.

Partnership. — The debt of one partner cannot be set off against that of a partnership, and vice versa; Collier v. Dyer, 27 Ark. 478; Harlow v. Rosser, 28 Ga. 219; Ward v. Newell, 37 Tex. 261; Meeker v. Thompson, 43 Conn. 77; Ross v. Pearson, 21 Ala. 473; Watts v. Sayre, 76 Ala. 397; Reed v. Whitney, 7 Gray 533; McKay v. Overton, 65 Tex. 82; Gardiner v. Fargo, 58 Mich. 72; Wilson v. Runkel, 38 Wis. 526; Singerly v. Fox, 75 Penn. St. 112; Coleman v. Elmore, 31 F. R. 391. Where a partner wrongfully uses partnership property to pay his own debts, there is relief in equity; Cornells v. Stanhope, 14 R. I. 97. See Weaver v. Rogers, 44 N. H. 112. In an action for debt due from defendant to plaintiff, the former cannot set

off a debt due from the latter to a firm in which both are partner; Houston v. Brown, 23 Ark. 635; Land v. Cowan, De Ala. 207. See Scott v. Campbell, 30 Id. 728. Sample v. Grafith, 5 lown 376. An agreed believe due from our partner to another upon a partnership settlement is a good set off; Dana r. Barrett, 3 J. J. Marsh, 6. In a smit by a surviving partner for a dabt due from the firm, the dof miant may set off a debt due to him from the surviving partner alone; Hollcook s. Lackey, 13 Met. 182; Bush e. Clark, 127 Mass. 111, 112; Millor e. Franklin Bank, I Page III. So in most actions by and a junst surviving partners there seem to be liberal rights of set all; Macturson v. Goodlett, 46 Tex. 102; Newberry v. Trawbridge, 13 Mich. 263; William Howes, 5 S. & R. 468. So there may be set off in the one of special agreements or particular book charges; Hood v. Riley, 15 N. J. Lew 127; Lamb v. Brolaski, 38 Mo. 51 See Cilley v. Van Patten, 58 Math. 404. It is held that copartners trusteed may set off a claim due from the defendant to one of the partners; Robinson v. Furbush, 34 Me. 500.

Husband and wife The same general principle applies where a set-off is of timed in case of dominds relating to husband and wife. In most cases there can be no sot off; Morris v. Bouth, S. Ala, 207; Glazebrook v. Rughard, S. Gratt. 332; Smith v Johnson, 5 Harr. 40; Januara & Brudy, 6 S. & R. 466; Pierce v Dustin, 21 N. H. 417; Naglee v Ingersoft, 7 Penn. St. 185; Bentz v. Bentz, 95 Penn. St. 210; Dayle v. Orr, 51 Miss 233; Heinkricks v. Toole, 29 Mich. 340; Musselman r. Galligher, 32 Iowa 383; Challes c. Wylle, 35 Kans. 506; Sloteman v. Thomas Mfg. Co., 69 Wis 499. Where the obligees of a bond sund for the use of a feme plaintiff and husband, an account was set off of medical services to the wife before marriage; Gary v. Johnson, 72 N. C. 68. See Johnson v. King, 20 Ala. 270. A promissory note executed by husband and wife, the latter as surety, is available as a set-off against a note executed to the husband; Abshire v. Corey, 113 Ind. 484.

Principal and agent.—The debt of an agent cannot be offset against one due the principal; Wilson v. Codman, 3 Cr. 193. Where a broker sells goods without any possession of the same, and the purchaser knows it, receiving the same from the principal, the purchaser cannot set off against the seller a debt due to him from the broker; Dunn v. Wright, 51 Barb. 244. See New Orleans v. Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569;

Carman v. Garrison, 13 Penn. St. 158; Forney v. Shipp, 4 Jones' (N. C.) Law 527. But the purchaser may treat the agent as owner, and in an action brought by the principal for the price may set off a claim he has against the agent, provided the purchaser supposed the agent was owner and there were no circumstances to put him on inquiry; Frame v. William Penn Co., 97 Penn. St. 309; Huntington v. Knox, 7 Cush. 371; Nichols v. Martin, 35 Hun 168, 170; Wright v. Cabot, 89 N. Y. 570; McLachlin v. Brett, 105 N. Y. 391; Hurlbert v. Pacific Ins. Co., 2 Sum. 471. See Granger v. Hathaway, 17 Mich. 500; Noble v. Leary, 37 Ind. 186; White v. Jaudon, 9 Bosw. (N. Y.) 415.

Principal and surety. — The question of mutuality in case of demands of principal and surety is largely one of statute, and often involves equitable principles; Knour v. Dick, 14 Ind. 20; Davis v. Milburn, 3 Iowa 163, 167; Newell v. Salmons, 22 Barb. 647; Crist v. Brindle, 2 Rawle 121. "The principal debtor is the real debtor, and the surety but security for the payment of the principal's separate debt; and offsetting a demand in favor of the principal debtor alone, when sued with his surety, is setting off against each other what may be regarded as essentially mutual debts;" Himrod v. Baugh, 85 Ill. 435, 438; Mahurin v. Pearson, 8 N. H. 539; Concord v. Pillsbury, 33 Id. 310. The note of a principal and surety may be set off against a note of such principal alone; Andrews v. Varrell, 46 Id. 17. See Newell v. Salmons, supra; Myers v. State, 45 Ind. 160. But it has been held that there can be no set-off unless by consent of the principal; Lynch v. Bragg, 13 Ala. 773; Woodruff v. State, 7 Ark. 333; Dart v. Sherwood, 7 Wis. 523. But set-off is generally allowed in Indiana "when the action is upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein;" Sefton v. Hargett, 113 Ind. 592, 594. But set-off is often denied where circumstances are exceptional; Gentry v. Jones, 6 J. J. Marsh. 148; Holden v. Gilbert, 7 Paige 208; Cox v. Cooper, 3 Ala. 256; State v. Modrell, 15 Mo. 421; Peine v. Lewis, 64 Miss. 96. And a surety when sued alone cannot, "without the assent of the principal, set off a debt due the principal from the plaintiff in the suit, to discharge him, the surety, from his liability;" Graff v. Kahn, 18 Bradw. 485, 487.

In case of assignment. — A set-off, not due to the defendant

but assigned to him, must have been made, to be valid, before the commencement of the suit; Martin r. Williams, 17 Johns. 230. See Walker c. McKay, 2 Met. (Ky.) 294; Thompson c. Mes Clelland, 29 Penn. St. 475; Speers c. Sterrett, Id. 192; Follott r. Buyer, 4 Ohio St. 586; Olinstead c. Scutt, 55 Conn. 125. As to promissory notes, see Whitaker v. Turnbull, 18 N. J. Law 172; Johnson r. Comstock, 6 Hill 10. As to a bond, see Backus v. Spaubling, 129 Mass. 231; 8 Johns. 152; Russell v. Lithgow, I Bay (S. C.) 437; Raddlek v. Moore, 65 N. C. 382. The holder by delivery of a non-negotiable note cannot set off the same in an action against him by the maker; Avres a. McConnel, 15 III. 230. See Hickerson v. McFublin, 1 Swan (Tenn.) 258. Choses in action assigned conditionally cannot be set off; Shryock r. Bischore, 82 Penn. St. 159; McDade r. Mead, 18 Ala. 214; McDonald v. Harrison, 12 Mo. 447. An assignee of a contract for the payment of money holds it free from any offsets in favor of the debtor against the assumor, created after notice to the debtor of the assignment. See Martine v. Willis, 2 E. D. Smith (N. Y.) 524; Solomon v. Holt, 3 Id. 139; Robinson e. Swigart, 13 Ark, 71. Some statutes provide that assignment shall not be it so toff; Cardner v. Risher, 35 Kans, 93. In a suit by the assigned after maturity of a promissory note, it is a good reply to an answer of set off by the maker against the assignor, that the maker is indebted to such assignor in a sum in excess of that claimed as a sot off; Meeker v. Shanks, 112 Ind. 207. See Luons v. The East Co., 38 Hun-581.

In case of insolvency. Where the assignees of personal representatives of a bankrupt or insolvent are plaintiffs or defendants, liberal rights of set-off are granted by statute, or equitable principles are adopted in many states. Often a general balancing of mutual demands is allowed irrespective of the period when they became due or the person in whom the right of action is vested. See Abbrich v. Campbell, 4 Gray 284; Clarke v. Hawkins, 5 R. I. 219, 224; Morrow v. Bright, 20 Mo. 298; Raymond v. Green, 12 Neb. 215, 220; Marks v. Barker, 1 Wash. C. C. 178; Jones v. Robinson, 26 Barb, 310. But debts purchased with knowledge of the debtor; insolvency or insolvent condition and notice to the debtor of the purchase cannot be set off in an action by the assignee upon a debt due from the purchaser to the debtor; Smith v. Hill, 8 Gray 572; Long v.

Penn. Ins. Co., 6 Penn. St. 421. Old cases in which no set-off was allowed are Henriques v. Hone, 2 Edw. Ch. (N. Y.) 120; Boinod v. Pelosi, 2 Dall. (Penn.) 43; Bateman v. Connor, 6 N. J. Law 104; Johnson v. Bloodgood, 1 Johns. Cas. 51. It has been held in an action by the assignee of a debtor for the benefit of creditors, against a creditor for the conversion of notes of the debtor held as collateral, that the defendant cannot set off the debtor's general indebtedness; Lane v. Bailey, 47 Barb. 395. And in an action by an assignee on a debt due after the voluntary assignment, the defendant may set off a debt due from the assignor at the time of the assignment. A bank made an assignment holding the defendant's note not due and was indebted to the defendant for deposits exceeding the note. In an action on the note after maturity the defendant was allowed to offset the indebtedness to him; Jordan v. Sharlock, 84 Penn. St. 366; s. c. 24 Am. Rep. 198. See Matter of Fulton's Estate, 51 Penn. St. 204; Rubey v. Watson, 22 Mo. App. 428; Skiles v. Houston, 110 Penn. St. 254. A similar rule seems to have been adopted in New York; New Amsterdam Bank v. Tartter, 4 Abb. New Cas. 215; s. c. 54 How. 385; Fort v. McCully, 59 Barb. 87. See, also, Finnell v. Nesbit, 16 B. Mon. 351. But in Connecticut a depositor upon the insolvency of a savings bank cannot set off his deposit against a debt due from him to the bank, unless the deposit was made to be applied in payment of the indebtedness to that amount with the knowledge of the officers; Osborn v. Byrne, 43 Conn. 155; s. c. 21 Am. Rep. 641. A bank indebted to an insolvent depositor cannot purchase a claim against the insolvent estate and offset it; Union Bank v. Hicks, 67 Wis. 189. See Re Cleveland Ins. Co., 22 F. R. 200; Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398; Smith v. Felton, 43 N. Y. 419; Case v. Cannon, 23 La. Ann. 112.

This principle of set-off is extended to the assignees or receivers of insurance companies, and the latter's customers. These have been allowed to set off the amount due for losses, although not definitely ascertained in a suit for premiums by the assignees or receivers; Holbrook v. Receivers, 6 Paige 220. But where at the time of the receiver's appointment the company had claims against the defendant, who held two of the company's endowment policies not yet due, in which it was to pay the sum insured to his wife upon his death prior to a certain date, and if he was living, then to him, it was held in

an action on the claims that the defendant could not set off the reserve value of the policies; Newcomb v. Almy, 25 N. Y. 308. See Re Cleveland Ins. Co., 22 F. R. 200; Ryan v. Anglewa, 12 At. Rep. 539. Where a manager was employed by the receiver of an insolvent corporation to perform the latter's diffus, and an amount from the proceeds of the mortgage was awarded to the receiver as compensation, and he was directed to pay the manager a portion thereof, it was hold that the indebtedness from the manager to the receiver in a larger amount being admitted a petition by the manager for an order compelling the receiver to pay him the amount specified should be dismissed; Gatzmer v. Philadelphia Railway Co., 39 N. J. Eq. 363. The following cases are important in their treatment of the subject as applicable to the estates of deceased insolvents.

" In the settlement of the estates of deceased insolvents, the analogical rule followed here in regard to setsoff is, as it is in other states, the equivable rule of the bankrupt systems of England and the United States; that is, without regard to any special connection between the claims sought to be set off, to sink the sum due to the insolvent by the amount of the sum actually due from him to his debtor, and, in touth, to hold the latter to be a debtoy to the estate only for the balance;" Clarke v. Hawkins, 5 R. I. 219, 224; McDonald v. Webster, 2 Mass. 498; Irons v. Irons, 5 R. I. 264. It was accordingly stated in Clarke v. Hawkins that the analogy should apply to the winding up of insolvent corporations as in New York and New Jersey: McLaren v. Pennington, 1 Page 112: Miller v. Receivers, Id. 444; Re Receivers, Id. 585. In Aldrich v. Campbell, 4 Gray 284, it is said, "This one I not to be determined upon the technical rules of soton, but upon the principles regulating the settlement of insolvent estates, whether of persons living or deceased. The settlements with such estates are final, and all mutual demands are to be balanced. Claims not liquidated, and debts absolutely due, though payable in the future, are to be included. The balance found upon such adjustment is the only dobt remaining. In the case of an insolvent estate of one deceased all claims existing at the time of the death are to be set off; in the case of an insolvent estate of a person living, all claims existing at the time of the first publication of the notice of the issuing of the warrant." See Demmon v. Boylston Bank, 5 Cush, 194; Bige-

low v. Folger, 2 Met. 255; Phelps v. Rice, 10 Id. 128; Bemis v. Smith, 10 Id. 194. But the rules relating to the settlement of insolvent estates of persons living or deceased, or to actions brought by assignees under an assignment for the benefit of creditors, are declared to have no application to the claim of an assignee of a chose in action; Smith v. Felton, 43 N. Y. 419, 422, 423; Commonwealth v. Shoe and Leather Ins. Co., 112 Mass. 131; Spaulding v. Backus, 122 Id. 553, 555. It has been held that where a bank has a lien on its own stock, given by usage and by-laws of directors, for advances to a stockholder, the assignees in insolvency of the latter cannot compel the transfer of the stock without paying the amount due to the bank; Morgan v. Bank of North America, 8 S. & R. 73, 88. In Receivers v. Paterson Gas Light Co., 23 N. J. Law 283, it was held that a debtor of an insolvent bank, whether his indebtedness has accrued or not at the time of the insolvency, may set off against the same either a deposit in the bank or the bills thereof received by him in good faith before the company's failure. And it was further stated, that the claim against the insolvent corporation did not constitute a legal set-off under the statute of set-off, as against the receivers; but that, in an action at law by the receivers, the defendant would be permitted, under the statute to prevent frauds by incorporated companies, to avail himself of the defence. This case contains extensive references to the jurisdiction of equity over set-offs in cases arising under bankrupt and insolvent laws. It shows that the jurisdiction was exercised by the courts long before the introduction of the provision into the statutes. After stating that the fact that "all well-considered bankrupt laws do contain so broad a provision in favor of set-offs is in itself the strongest authority in support of the natural equity and justice of the provision." It is said that "the general right of set-off was first introduced in the bankrupt law in the year 1708, by the statute 4 Anne, cap. 17; but the course of adjusting the balance was adopted in practice as early as 1675. Thus, in 28 Car. 2 (1675), Lord North said, If there are accounts between two merchants, and one of them becomes bankrupt, the course is not to make the other to pay the whole that was originally intrusted to him, and to put him, for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors, but to make him pay that

only which appears to be due to the bankrupt on the foot of the account, Mod. 215."

It has already been stated that unmatured claims cannot be set off; and it is said that no claim originating or acquired after bankruptey or the death of an insolvent can be set off against the executors or assignces of the insolvent or the assignces of the bankrupt because the assets are then held in trust for all the creditors; Northampton Bank v. Balliet, S.W. & S. 317, 318; Irons v. Irons, 5 R. I. 264, 267; Clarke v. Hawkhus, Id. 219. In Smith v. Hill, 8 Gray 572, previously quoted, it was held that a debt purchased with knowledge of the debtor's insolvency, and reason to believe that he is about to go or be driven into insolvency, and notice to the debtor of the purchase, cannot be set off in an action by the assignee in insolvency upon a debt due from the purchaser to the debtor. The case is distinguished from Aldrich v. Campbell, supra, the court saying that "to allow this set-off would not be consonant with equity or justice to the parties interested; would directly tond to defeat an equitable distribution of the assets among the creditors generally; and would enable a debtor of an insolvent - one notoriously so, and who was about to become the subject of proceedings in insolvency to give a preference to such creditors of the insolvent as he might be disposed to favor, making their debts available to the whole amount due, if the purchaser pleased to take them at that rate, as he might well do if he was to be allowed their full amount as an available set-off against his own debt to the insolvent; or, what would be equally objectionable, to allow the debtors of the insolvent to discharge their liabilities by a set-off acquired by purchasing the depreciated debts of the insolvent at a large discount from their nominal amount." See Richter v. Selin, 8 S. & R. 425; Finney v. Bennett, 27 Gratt. 365; Smith r. Brinckerhoff, 8 Barb, 519; Ogden r. Cowley, 2 Johns, 274; McClenahan v. Cotten, 83 N. C. 332; control, Martin v. Mohr, 56 Ala. 221; McGowan v. Budlong, 79 Penn. St. 470. In Ex parte Whiting, 2 Low, 472, it was held where A. was a creditor of a bankrupt for two distinct debts, and held shares of stock in pledge for one of them, with a statutory power of sale existing at the date of bankruptcy, that he could apply the surplus proceeds of the shares, after paying the first debt, to the payment of the second. See Ex parte Howard Nat. Bank, Id. 487. By U. S. Rev. Sts. § 5073, provision is made as

to set-off in case of mutual credits, but debts purchased after the filing of the petition in bankruptcy are prohibited. This section was enlarged by act of June 22, 1874, c. 390, § 6, by providing that § 20 of the original act, now § 5073 of the Rev. Sts., should be amended by adding to the end of the first clause of said § 20 the words "or in cases of compulsory bankruptey, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off." This has been held to apply only to cases of compulsory bankruptcy; Lloyd v. Turner, 5 Saw. 463; and it would seem to both voluntary and involuntary; Hunt v. Holmes, 16 Bank. Reg. 101. In Williamson v. Gayle, 7 Gratt. 152, this equitable principle under consideration seems to have been extended to a case of foreign attachment. It was held that the home defendant having property of the absent defendant, for keeping which the absent defendant was indebted to him, was entitled to his claim out of the property as against the attaching creditor.

Demands by executors and administrators. — An executor or administrator cannot set off a debt purchased by him after the death of the testator or intestate, against a demand due by the estate of the deceased or accruing in his life-time; Dudley v. Griswold, 2 Bradf. (N. Y.) 24. If he uses the funds to buy up debts against claimants he must assume the risk individually; Mead v. Merritt, 2 Paige, 402. A defendant cannot set off a debt due to him as administrator; Thomas v. Hopper, 5 Ala. 442. Otherwise when he has been charged with it on final settlement in the probate court before issue of writ; White v. Word, 22 Id. 442. A debt due to an administrator personally cannot be set off against the share of a distributee of the estate; Bradshaw's App., 3 Grant's (Penn.) Cas. 109; Richbourg v. Richbourg, 1 Harp. (S. C.) Ch. 168. An executrix cannot set off damages for harassment and attorney's fees paid against a claim prosecuted against the estate; House v. Collins, 42 Tex. 487. In an action against an administrator for a debt of his intestate the defendant cannot set off a sum due on a note of the plaintiff to him as administrator for his intestate's goods sold by him as such administrator; Smith v. Edwards, 1 Houst. (Del.) 427. For a set-off that was allowed under the New York code, see Lerche v. Brasher, 37 Hun 385. In many cases against executors and administrators the latter have been allowed to set off demands held by them against the plaintiffs where there was mutuality, and the cases were brought within the recognized principles of the subject. See Percy v. Clary, 32 Md. 245; Pearson v. Darrington, 32 Ala. 227; Burke v. Stillwell, 23 Ark. 294; Wilson v. Edmonds, 24 N. H. 517; Galloney's App., 6 Penn. St. 37; Strong v. Bass, 35 Id. 333. See, also, Boyd v. Townes, 79 Va. 118; Titus v. Hoagland, 39 N. J. Eq. 294. It is a general rule that a legator owing the testator is entitled to only the excess of the legacy over his debt; Armour v. Kendall, 15 R. I. 193. See Howze v. Davis, 76 Ala. 381.

Demands against executors and administrators. - If an executor or administrator brings suit upon a debt created against the defendant, or upon which the cause of action arose after the testator or intestate's death, it is a general rule that the defendant cannot set off a debt existing and snable against the testator or intestate in his life-time; Root v. Taylor, 20 Johns, 137; Dale v. Cooke, 4 Johns. Ch. 13. See Shaw v. Gookin, 7 N. H. 16; Cook r. Lovell, 11 Iowa 81; Wolfersberger r. Bucher, 10 S. & R. 10; Jordan v. Nat. Shoe Bank, 12 Hun (N. Y.) 512; Patterson v. Patterson, 59 N. Y. 574; Bizzell v. Stone, 12 Ark. 378; Harte v. Houchin, 50 Ind. 327; Daybuff v. Daybuff, 27 Id. 158; Wakeman v. Everett, 41 Hun 278. See, also, Steel v. Steel, 12 Penn. St. 64; McDonald v. Black, 20 Ohio 185; McLaughlin v. Winner, 63 Wis. 120; Stuart v. Commonwealth, S. Watts (Penn.) 74. A claim due from an executor in his individual capacity cannot be set off against a demand due the testator; Wisdom v. Becker, 52 Ill. 342. See Harris v. Taylor, 53 Conn. 500. See Westfall v. Dungan, 14 Ohio St. 276. It has been held in a suit by an administrator for a debt due deceased, the defendant may set off a debt due him by the firm of which deceased was a member; Blair r. Wood, 108 Penn. St. 278. Where suit is brought by executors against a legatee for money due he cannot plead the amount of his legacy as a set-off unless he shows the estate solvent and ready to be distributed; Dobbs v. Prothro, 55 Ga. 72. See Guthrie v. Guthrie, 17 Tex. 541. Many cases turn upon the strict meaning of the code or statutes allowing or forbidding a set-off against an executor or administrator; Turner v. Tapscott, 30 Ark. 312; Tyler v. Boyce, 135 Mass. 558; Martin v. White, 58 Vt. 398; Russell v. Hubbard, 76 Ga. 618; Carr v. Askew, 94 N. C. 194; Scherer v. Ingerman, 110 Ind. 428; Rogers v. Murdock, 45 Hun 30.

Mortgagor and mortgagee. — "The proceedings to foreclose a mortgage are in rem, and not against the person of the debtor. The principles of set-off do not apply." Where the holder of a mortgage died, naming the mortgagor his executor, and on a settlement of the executor's account a balance was due him from the estate, it was held that such balance could not be set off in a suit to foreclose against the amount due thereon; Dolman v. Cook, 14 N. J. Eq. 56; Bird v. Davis, Id. 467. In a suit to foreclose, the defendant cannot set off against the mortgage debt unliquidated damages for breach of an agreement, foreign to the mortgage debt, on the ground that the plaintiff had parted with some of his property and had threatened to put the residue beyond defendant's reach; Jennings v. Webster, 8 Paige 503. But see Rawson v. Copland, 2 Sandf. Ch. 251; s. c. 3 Barb. Ch. 166. Damages for the breach of a subsequently made contract cannot be set off against the amount due upon a mortgage; Long v. Long, 14 N. J. Eq. 462. A lessee, who is mortgagee, cannot in a suit for rent set off the mortgage interest; Scott v. Fritz, 51 Penn. St. 418. Where one gives his note, secured by mortgage, for property sold to him and warranted as to quality, and when the note matures, others, to prevent foreclosure, take the note up and give their own in lieu, they cannot, in a suit against them, set off damages to the maker of the first note, occasioned by a breach of the warranty; Zuckermann v. Solomon, 73 Ill. 130. See Timms v. Shannon, 19 Md. 296. Where the mortgagee of personal property brings action to foreclose, and recovers a judgment, subsequent purchasers of the goods cannot set up a demand in favor of the mortgagor against the mortgagee; Beers v. Waterbury, 8 Bosw. (N. Y.) 396. When the mortgagee brings a bill to foreclose, the mortgagor may set up any defence other than the statute of limitations, available in an action at law on the debt. But when he resorts to equity to obtain the benefit of a set-off he must show some other ground of equity than a mere legal demand, which may be set off under the statute; Knight v. Deane, 77 Ala. 371. For a case where the plaintiff had the equitable right, when, or before, the mortgage note matured, to surrender to the mortgagee, the defendant, his notes held by her, and to have the money due upon them credited upon the

note he held against her. See Harrison v. Bray, 92 N. C. 488. See, also, Byerly v. Humphrey, 95 N. C. 151. In case of foreclosure the statutes of some states confer liberal rights of set-off; Lowry v. Hurd, 7 Minn. 356; Allen v. Maddox, 40 Iowa 124. In an action by an assigned to foreclose a mortgage, assigned to him as collateral for a larger debt, to which the mortgagee is not made a party, the mortgager cannot set off the amount of a note against the mortgager purchased by him after the transfer of the mortgage; Blakely v. Twining, 69 Wis. 238.

Claims by or against banks. - "The general rule is that a bank has a right of set-off as against a deposit, only when the indiyidual who is both depositor and debtor stands, in both these characters alike, in precisely the same relation, and on precisely the same footing towards the bank, and hence an individual deposit cannot be set off against a partnership debt;" International Bank r. Jones, 119 III, 407, 410. Bills of a bank acquired after its insolvency cannot be set off against debts due it at the time of insolvency; Diven v. Phelps, 34 Barb, 224; Exchange Bank v. Knox, 19 Gratt. 739; Gee v. Bacon, 9 Ala, 699. See Clarke v. Hawkins, 5 R. I. 219. It is immaterial if a part of the bills were held by the defendant when the bank tailed and the debt matured; Eastern Bank c. Capron, 22 Conn. 639. Stock in a bank is not a set-off against a note given to it; Whittington v. Farmer's Bank, 5 Har. & J. 489. The notes of a state bank, after it has organized as a national bank, cannot be set off against a judgment recovered by the latter; Thorpe r. Wegefarth, 56 Penn. St. 82. Deposits made with bankers after withdrawal of a partner, by the maker of a note to them before withdrawal, cannot be set off against the note; Dawson v. Wilson, 55 Ind. 216. For a case where it was held that a dividend that would be coming to one as stockholder upon winding up, was not available as a set-off, see Ruckersville Bank v. Hemphill, 7 Ga. 396. For a case where it was held that there were no mutual creditors, see Stetson v. Exchange Bank, 7 Gray 425. See further on this subject, Bank r. Macalester, 9 Penn. St. 475; Andrews v. Artisans' Bank, 26 N. Y. 298; Re Van Allen, 27 Barb, 225; American Bank v. Wall, 56 Me. 167; Colt v. Brown, 12 Gray 233.

Public officers and the government. — Generally, set-off is not allowed in cases of demands by or against public officers; Rus-

sell v. First Presbyterian Church, 65 Penn. St. 9; Wilson v. Lewistown, 1 Watts & Serg. 428; Harper v. Howard, 3 Ala. 284. See United States v. Ringgold, 8 Pet. 150. It cannot be applied to the salary of the Attorney-General, 80 Va. 485. See Waterbury v. Lawlor, 51 Conn. 171.

The state being sovereign can be sued only by its own consent, hence, in actions by the state, the right of set-off does not exist, unless given by statute; White v. Governor, 18 Ala. 767; Chevallier v. State, 10 Tex. 315. A tax not being a debt is not liable to a set-off; Gatling v. Commissioners, 92 N. C. 536. See Newport Bridge Co. v. Douglass, 12 Bush (Ky.) 673; Cobb v. Elizabeth City, 75 No. Car. 1; Finnegan v. City of Fernandina, 15 Fla, 379; City of New Orleans v. Davidson, 30 La. Ann. 541, 554; Hibbard v. Clark, 56 N. H. 155. Where the Commonwealth undertakes to litigate with a citizen or corporation, the latter may, by set-off or counter-claim, defeat the recovery of the state, but, in the absence of some special legislative authority, the defendant cannot have judgment over against the Commonwealth; Commonwealth v. Owensboro R. R. Co., 81 Ken. 572. The law of set-off in case of United States government will be found at the conclusion of the notes on "counter-claim."

Various points. — The following points are of a general nature, and are nearly all taken from late cases. Instead of pleading a set-off or counter-claim, a defendant may make it the subject of an independent action; Blackwell Co. v. McElwee, 94 N. C. 425. Generally the plaintiff cannot discontinue or be non-suited; Holcomb v. Holcomb, 23 Fed. Rep. 781; Whedbee v. Leggett, 92 N. C. 469; O'Malley v. Judy, 16 Mo. App. 553. A set-off may be pleaded as a defence to an action brought in the United States courts in any state where that plea is permissible by the laws of the state; Frick v. Clements, 31 Fed. Rep. 542; Partridge v. Ins. Co., 15 Wall. 573. For cases where the right of set-off was held to be superior to an attorney's lien, or to the rights under an assignment of an overdue debt; Fairbanks v. Devereaux, 58 Vt. 359; McDonald v. Smith, 57 Id. 502. Where the amount claimed by way of set-off exceeds the jurisdiction of the state court from which the cause is removed to the United States court, the United States court has no jurisdiction; Hummel v. Moore, 25 Fed. Rep. 380. As to abatement by death under a statute, see

Farrall v. Shea, 66 Wis. 561. If a co-plaintiff is admitted by amendment, in ease of a verdict against them, the recovery upon the counter-claim will be against both; Mack r. Sloteman, 21 Fed. Rep. 109. When payment and set-off are pleaded the burden of proof is on the defendant; Brigham v. Carlisle, 78 Ala, 243. See Phillips v. Railroad Co., 107 Penn. St. 472; Smith v. McGregor, 96 N. C. 101; Ellis r. Cothran, 117 Ill. 458. As to questions of res adjudicata, Krapp v. Eldridge, 33 Kan. 106; Bank v. Ketchum, 66 Wis. 428. A stockholder who is a creditor of the corporation cannot offset his unpaid subscription as against the general indebtedness of the corporation; Thompson v. Lake, 19 Ney, 103. But in a proceeding under the statute, against a holder of unpaid shares by a creditor of the corporation, the shareholder may offset a matured indebtedness of the corporation to him; Webber v. Leighton, 8 Mo. App. 502. It has been held that a bank cannot set off the amount due upon a promissory note against a certificate of deposit; Shute v. Pacific Nat. Bank, 136 Mass. 487. And interest received by a national bank upon a note, greater than the rate allowed by the state law where the note was made, in violation of U.S. Rev. Sts. § 5197, cannot be set off in an action by the bank upon the note against the amount due thereon; First Nat. Bank v. Childs, 133 Mass. 248; 130 Id. 519. Statute of Limitations is not a defence to set off if cross demand was a legal subsisting claim when plaintiff's right of action accrued; Patrick v. Petty, 83 Ala, 420. One having a note and account against another may sue upon the note and reply the account as a set-off against an equal amount pleaded as a set-off by the defendant; Blount v. Rick, 107 Ind. 238.

Judgments.—"While there is no express statute authority for setting off judgments where the creditor in one action is the debtor in another, except in a limited number of cases" given by statute, "yet this power has been frequently exercised by courts of law, and rests upon their jurisdiction over suitors in them and their general superintendence of proceedings before them;" Ames v. Bates, 119 Mass. 397; Badlam v. Springsteen, 41 Hun 160; Sneed v. Sneed, 14 Tenn. 13; Frazier v. Hendren, 80 Va. 265; Bosworth v. Tallman, 66 Wis. 533. And it is said that the "practice of setting off one judgment against another, between the same parties, and due in the same rights, is ancient and well established;" Holmes v. Robinson, 4 Ohio 90;

Temple v. Scott, 3 Minn. 419. In the absence of statute, the direction of the court controls. "A court can only order one judgment to be set off against another when equity and good conscience require that such a set-off shall be made;" Beard v. Puett, 105 Ind. 68, 70. See Junker v. Hustes, 113 Id. 524; Butner v. Bowser, 104 Id. 255; Chipman v. Fowle, 130 Mass. 352; Herman v. Miller, 17 Kans. 328. A debt not in judgment cannot be set off against a judgment; Thorpe v. Wegefarth, 56 Penn. St. 82. See Zogbaum v. Parker, 55 N. Y. 120; Duff v. Wells, 7 Heisk. 17.

It has been held that the court will set off judgments of the same or of different courts; Hill v. Brinkley, 10 Ind. 102; Brooks v. Harris, 41 Id. 390. But they must be mutual; Rix v. Nevins, 26 Vt. 384. See Ledyard v. Phillips, 58 Mich. 204. Upon judgment, all the original peculiar features of a claim are lost sight of, and the demand ranks equally among all other judgments; Temple v. Scott, supra. The subject of assignment presents many interesting points: "It is not just that one should be encouraged instead of his paying his own debt to seek out claims against his creditor, in order thus to change the position of parties pendente lite, and this reason is equally applicable to judgments which may afterwards be obtained upon such claims;" Ames v. Bates, 119 Mass. 397, 399. See Desearn v. Babers, 62 Miss. 421. Often where the equitable rights of third parties would be affected by an off-set, it is not to be made to the injury of intervening rights honestly acquired; Id. 399; Zogbaum v. Parker, 55 N. Y. 120; Gay v. Gay, 10 Paige 369. See Perry v. Chester, 53 N. Y. 240; Wright v. Treadwell, 14 Tex. 255. The set-off of mutual judgments before the issue of executions is an equitable power incidental to the jurisdiction of courts over their suitors and officers, and is independent of any statute of set-off; Chase v. Woodward, 61 N. H. 79. Although if there has been an assignment to a third person before application for a set-off is made, such third person is the real party in interest, and no set-off can ordinarily be allowed. See Hovey v. Morrill, Id. 9, 13; Goodwin v. Richardson, 44 Id. 125. But see Mason v. Knowlson, 1 Hill 218; Turner v. Satterlee, 7 Cow. 480; Ault v. Zehering, 38 Ind. 429. A party may be subrogated to the rights of another, so as to be entitled to offset a judgment against one held against him. Gillette v. Hill, 102 Ind. 531. A judgment against A. and B. in their individual capacities, cannot be set off against them as administrators; McChesney v. Rogers, S.N. J. Law 272.

Statutes do not always require the mutual debts to be due to and from the same number of persons. See Ballinger r. Tarbell, 16 Iowa 491; Spurr r. Snyder, 35 Conn. 172. But it is held in Alabama that at law, a judgment against one partner individually cannot be set off, in whole or in part, against a judgment in favor of the partnership; and in equity, one judgment cannot be set off against the other to the extent of the individual partner's interest in the judgment, in favor of the partnership, on the ground of his insolvency; Watts r. Sayre, 76 Ala, 397. See Corwin r. Ward, 35 Cal. 195.

In order to justify an officer in refusing to make the set-off of executions of the respective parties in his hands, it must appear by his return, or otherwise, that the execution first delivered to him was assigned before the creditor in the second became entitled to the sum due thereon. See Dunklee v. Locke, 13 Mass. 525; Primm v. Ransom, 10 Mo. 444; Leuthers v. Carr, 24 Me. 351; New Haven Copper Co. v. Brown, 46 Id. 418. In New Jersey, the court has a broad equitable jurisdiction in ordering one judgment to be set off against another. It was held that a decree in admiralty for a libellant, on a libel for damages in a federal court, may be set off against a judgment recovered in the supreme court against the libellant, the parties in the suits being the same; Schautz v. Kearney, 47 N. J. Law 56. See Blackburn v. Reilly, 48 Id. 82.

Where a federal court of equity is asked to set aside the satisfaction of a state judgment at law or to determine equitable defences to that judgment, as preliminary to a decree of set-off against a judgment of the federal court itself, the parties will be sent to a competent state court to settle the controversy, the federal judgment being stayed; Lauderdale Co. v. Foster, 23 Fed. Rep. 516.

Counter-claim. — A counter-claim is the creature of statute or code. The term varies in meaning, but the general features of the counter-claim are the same in all states which have adopted it. It usually embraces both recoupment and set-off, and secures to a defendant all the relief given at law, or in equity, or by cross-suit, and includes liquidated or unliquidated damages; Clinton v. Eddy, 1 Lans. (N. Y.) 61; s. c. 54 Barb. 54; Boston Mills v. Eull, 6 Abb. (N. S.) 319; Waddell v. Darling, 51 N. Y.

327; Jarvis v. Peck, 19 Wis. 74; Dietrich v. Koch, 35 Wis. 618; Hay v. Short, 49 Mo. 139; Belleau v. Thompson, 33 Cal. 495; Wiswell v. First Cong. Church, 14 Ohio St. 31; Slone v. Slone, 2 Met. (Ky.) 339; Campbell v. Routt, 42 Ind. 410; Wilson v. Hughes, 94 N. C. 182; Hurst v. Everett, 91 N. C. 399; Parsons v. Sutton, 66 N. Y. 92; Grange v. Gilbert, 44 Hun 9. In other states, it is employed for a similar purpose; Russell v. Miller, 54 Penn. St. 154; Griffin v. Jorgenson, 22 Minn. 92; Bloom v. Lehman, 27 Ark. 489. It must have existed for the defendant against the plaintiff at the beginning of the action; Orton v. Noonan, 29 Wis. 541; Rickard v. Kohl, 22 Id. 506. In some states the provisions are so broad as to allow in an action on contract any other cause of action or contract, existing at the beginning of the suit, to be set off as a counter-claim; Wheelock v. Pacific Gas Co., 51 Cal. 223; Griffin v. Moore, 52 Ind. 295; Empire Co. v. Boggiano, 52 Mo. 294; Horne v. Hoyle, 28 Fed. Rep. 743; Church v. Speigelburg, 31 Id. 601. See Green v. Willard Co., 1 Mo. App. 202. In other states any claim springing from the transaction named in the complaint may be set up as a counter-claim, whether in test or contract; Bitting v. Thaxton, 72 N. C. 541. See Eversole v. Moore, 3 Bush. 49; Norden v. Jones, 33 Wis. 600; Hunt v. Chapman, 51 N. Y. 555; Allen v. Maddox, 40 Iowa 124; Grange v. Gilbert, 44 Hun 9; Met. Trust Co. v. Tonawanda, 43 Id. 521. In an action for rent the lessee may set up, as a counter-claim, damages from breaches of covenant in the lease; Cook v. Soule, 56 N. Y. 420. See Morgan v. Smith, 70 Id. 537; Orton v. Noonan, 30 Wis. 611; Hay v. Short, 49 Mo. 139. But not wrongful acts, independent of his obligation under the contract; Edgerton v. Page, 20 N. Y. 281. Great latitude is allowed where the course of action set up as a counter-claim is connected with the subject of the action set forth in the complaint; Glen Manf. Co. v. Hall, 61 N. Y. 226. See Stoddard v. Treadwell, 26 Cal. 294; Kisler v. Tinder, 29 Ind. 270; Starbird v. Barrons, 43 N. Y. 200; Isham v. Davidson, 52 Id. 237; McDougall v. Walling, 48 Barb. 364; Curtis v. Barnes, 30 Barb. 225; Hicksville R. R. Co. v. Long Island R. R. Co., 48 Id. 355; Woodruff v. Garner, 27 Ind. 4. It is held in Oregon that in an action upon a contract for money expended by a tenant in repairing a hotel, the owner may show that the building was burned by the tenant's carelessness; Zigler v. McClellan, 15 Or. 499. In a late case in California it is said that in an action on contract the defendant may set up as counter-claim a cause of action in his favor against the plaintiff for a balance on an open, mutual, and current account, although a prior action by him against the plaintiff on certain items of the account is still pending. The defendant need not dismiss the prior action, or elect between it and the counter-claim; Lindsay v. Stewart, 72 Cal. 540. See Inslee v. Hampton, 8 Hun 230; Gillespie v. Torrance, 25 N. Y. 306, 308; Lowry v. Hurd, 7 Minn. 356, 363.

It is a general rule, as in set-off, that the demand must be against the plaintiff in the capacity in which he sues, and some of the codes require that the demand must exist in favor of the defendant, and against a plaintiff between whom a several judgment might be had in the action. See Patterson v. Patterson, 59 N. Y. 574; McConihe v. Hollister, 19 Wis. 269; Linn v. Rugg, 19 Minn. 181; Thompson v. Sickles, 46 Barb. 49; Horne v. Hoyle, 28 Fed. Rep. 743; Paine v. Hunt, 40 Barb, 75; Hill v. Golden, 16 B. Mon. 551; Pendergast v. Greenfield, 40 Hun 494; Resch v. Senn, 31 Wis. 138; Hiner v. Newton, 30 Id. 640; Quinn v. Smith, 49 Cal. 163; Burrage v. Bonanza Gold Mining Co., 12 Or. 169. But where one indebted to an estate in the hands of receiver, executor, or trustee, is employed to render services beneficial to the estate, the value thereof is a proper counter-claim in an action to recover the debt; Davis v. Stover, 58 N. Y. 473.

It has been held that usury cannot be set up as a counterclaim; Prouty v. Eaton, 41 Barb. 409. See Geenia v. Keah, 66 Id. 245, 249; McDonald v. Smith, 57 Vt. 502. If that which is set up as a counter-claim on a contract, independent of the contract declared upon, although closely connected therewith, it is not available; Loomis v. Eagle Bank, 10 Ohio St. 327; Newkirk v. Neild, 19 Ind. 194. It has been held that an equitable defence, admissible in a state court, cannot be interposed to an action at law in an action at law in the United States Courts; Church v. Spiegelburg, 31 Fed. Rep. 601. For cases where it was held that a counter-claim was not admissible, but that the remedy should be against executors or administrators personally, see Gelshenen v. Harris, 26 Fed. Rep. 680; Westfall v. Dungan, 14 Ohio St. 276. The late cases enforce the rule referred to, that which is offered as a counter-claim must have existed at the commencement of the suit: Mayo v. Davidge,

44 Hun 342. See Drexler v. Smith, 30 Fea. Rep. 754. In Texas if the suit is founded on a certain demand, the defendant cannot set off unliquidated damages founded on the plaintiff's tort or breach of contract; Riddle v. McKinney, 67 Tex. 29. In Wisconsin, in an action for trespass upon land, a counter-claim for taxes is not available paid by defendent while in possession, believing that he was owner; Davidson v. Rountree, 69 Wis. 655.

It is a general rule that a counter-claim must be set up in the pleadings; Bates v. Rosekrans, 37 N. Y. 409; Steinhart v. Pitcher, 20 Minn. 102; Wythe v. Myers, 3 Saw. 595; Stowell v. Eldred, 39 Wis. 614; Quinn v. Smith, 49 Cal. 163. But see Gilpin v. Wilson, 53 Ind. 443; McManmus v. Smith, Id. 211. For a case which held that the answer did not make out a counter-claim within the code, but a set-off, see Delahaye v. Heitkemper, 16 Neb. 475, 480. Many of the codes provided that if the counter-claim, as established, exceeds the plaintiff's demand, the defendant must have judgment for the excess. See Fettretch v. McKay, 47 N. Y. 426; Hay v. Short, 49 Mo. 139; Moore v. Caruthers, 17 B. Mon. 669; Brainard v. Lane, 26 Ohio St. 632.

By § 1059, cl. second, U. S. Rev. Sts., and by act of March 3, 1887, c. 359, 24 st. 505, § 1, cl. second, the U. S. court of claims has jurisdiction to hear and determine "all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court." The provisions of this section have been held to be very broad; Allen v. United States, 17 Wall. 207, 5 C. of Cl. 339; Macauley v. United States, 11 Id. 693; Bonnafon v. United States, 14 Id. 493. As to "counter-claim," see further; Neitzey v. United States, 17 C. of Cl. 125; Brown v. District, Id. 420; Betts v. District, 20 Id. 448; United States v. O'Grady, 22 Wall. 641, 8 C. of Cl. 451.

Recoupment.— The doctrine of recoupment "does not rest on the nature of the right which a plaintiff has in the contract which he seeks to enforce, nor on the fact that his interest in it is the same at the time of suit brought as when it was originally entered into. The essential elements on which its application depends are two only. The first is, that the damages which the defendant seeks to set off shall have arisen from the same subject-matter, or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain his action;

the other is, that the claim for damages shall be against the plaintiff; so that their allowance by way of set-off or defence to the contract declared on shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as there relied on to defeat the action." It was held that the case under consideration came within the rule, as the claim of the defendant for damages arose out of the note in suit, inasmuch as it rested on the invalidity of the consideration for which it was given and the fraud of the plaintiff in obtaining it; Sawyer v. Wiswell, 9 Allen 39. See Harrington v. Stratton, 22 Pick, 510; Stacy v. Kemp, 97 Mass, 166; Davis v. Bean, 114 Id. 358; Grand Lodge v. Knox, 20 Mo. 433; Lufburrow v. Henderson, 30 Ga. 482; Fowler r. Payne, 49 Miss. 32; Weaver v. Penny, 17 Bradw. 628; Bush r. Finucane, 8 Col. 192; James r. Duke, 7 Id. 282; Brouty r. Five Thousand Staves, 21 Fed. Rep. 590, 23 Id. 106; C. Aultman & Co. v. Case, 68 Wis. 612; Gibson v. Carlin, 13 Tenn. 447; Davis r. Wait, 12 Or. 425; McAlester r. Landers, 70 Cal. 79; City Bank v. Smisson, 73 Ga. 422. It has been held that damages must be specifically alleged so that the plaintiff may not be exposed to surprise at the trial: Bolt v. Friederick, 56 Mich. 20; Whitworth v. Thomas, 83 Ala. 308. See McKleroy v. Sewell, 73 Ga. 657. The want of mutuality is fatal to the allowance of damages; City Council r. Montgomery Water Works, 79 Ala. 233. See Glover v. Gore, 74 Ga. 680; Sayannah Bank v. Hartridge, 73 Id. 223. Breach of warranty or fraud in the sale of personal property may be given in evidence when specially set up in the defendant's answer by way of recoupment; Wentworth r. Dows, 117 Mass. 14. See Bradley r. Rea, 14 Allen 20; Carey v. Guillow, 105 Mass. 18; Owens v. Sturges, 67 Ill. 366; Murray v. Carlin, Id. 286. That fraud is an important element when the consideration consists of real estate conveyed by deed with covenants of title, see Bowley v. Holway, 124 Id. 395. For eases where the causes of action were independent and did not arise out of the same contract or cause of action, so that recoupment was not permitted, see Bartlett v. Farrington, 120 Id. 284; De Witt v. Pierson, 112 Id. 8; Brighton Savings Bank v. Sawyer, 132 Id. 185; Home Savings Bank v. Boston, 131 Id. 277; Smith v. Osborn, 143 Id. 185; Keves v. Western Slate Co., 34 Vt. 81; Sampson v. Warner, 48 Id. 247. A claim cannot be enforced by way of recoupment which the defendants could not enforce by direct suit; McCarthy v. Henderson, 138 Mass. 310. "Recoupment is contra-distinguished from set-off in these three essential particulars: 1, in being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought; 2, in having no regard to whether or not such matter be liquidated or unliquidated; and 3, that the judgment is not the subject of statutory regulation, but controlled by the rules of the common law;" Myers v. Estell, 47 Miss. 4. In Sterling Organ Co. v. House, 25 W. Va. 64, 83, which, like Myers v. Estell, gives a history of the subject, another difference is stated, that "if the defendant's claim exceeds the plaintiff's, he cannot in that action recover the balance which was due to him." See Kingman v. Draper, 14 Bradw. 577; Fowler v. Payne, 52 Miss. 210; Batterman v. Pierce, 3 Hill 171. But see Springdale Asso. v. Smith, 32 Ill. 252; Overton v. Phelan, 2 Head (Tenn.) 445. There is a distinction between "recoupment" and "counter-claim" dependent largely upon the definition of "counter-claim" in codes or statutes; Hurst v. Everett, 91 N. C. 399. See Thompson v. Mitchell, 74 Ga. 797. See "counter-claim," supra.

Formerly, it was said that it was necessary that fraud should be imputed to the plaintiff, but it is now settled that the doctrine is applicable where the defendant only complains of breach of contract. See Myers v. Estell, 47 Miss. 4, 23; Batterman v. Pierce, 3 Hill 171; Ives v. Van Epps, 22 Wend. 155. Recoupment is favored rather than a separate action; Martin v. Hill, 42 Ala. 275; Peck v. Brewer, 48 Ill. 54. Recoupment has been allowed in assumpsit for breach of agreement to the effect that the plaintiff has violated the same agreement; Fowler v. Payne, 49 Miss. 32; Andrews v. Eastman, 41 Vt. 134; Rogers v. Humphrey, 39 Me. 382. So, too, for damages to the defendant by reason of failure of plaintiff to keep his contract; Eddy v. Clement, 38 Vt. 486. So, also, for damages to employer by want of skill of one claiming to be a skilled laborer; De Witt v. Cullings, 32 Wis. 298. Government duties may be deducted from the price of goods which were to be delivered free of charge; Fitch v. Archibald, 29 N. J. Law 160. See Cassidy v. LeFevre, 45 N. Y. 562; Estep v. Fenton, 66 Ill. 467.

The claims need not be of the same character; one in contrast may be set off against one in tort, and conversely, if they arise out of the same subject-matter; Streeter v. Streeter, 43 Ill. 155; Waterman v. Clark, 76 Id. 428; Heck v. Shener, 4

S. & R. 249; Hopping v. Quin, 12 Wend. 517. See Carey v. Guillow, 105 Mass. 18; Hastings v. McGee, 66 Penn. St. 384. And it is a general rule that damages may be recouped for any breach of contract or failure on the part of the plaintiff to earry out his agreement; Gordon v. Bruner, 49 Mo. 570; Hill v. Southwick, 9 R. I. 299; Lee v. Clements, 48 Ga. 128; Finney v. Cadwallader, 55 Id. 75; Harralson v. Stein, 50 Ala. 347; Pepper v. Rowley, 73 Ill. 262; Scott v. Kenton, 81 Id. 96; Belden v. Perkins, 78 Id. 449; Williams v. Schmidt, 54 Ill. 205; Mell v. Moony, 30 Ga. 413. Recoupment is often resorted to in an action for services to show the plaintiff's negligence or no beneficial service; Dodge v. Tileston, 12 Pick. 328; Phelps v. Paris, 39 Vt. 511; Sterrett v. Houston, 14 Tex. 153; Still v. Hall, 20 Wend. 51. And in case of charter parties and in suits by earriers for freight; Bearse v. Ropes, 1 Spr. 331; Id. 361.

If the vendee fails in his contract, he cannot recoup for a default of the vendor caused by such failure; Chapman v. Dease, 34 Mich. 375. There is no recoupment where the damages are too remote: Turner v. Gibbs, 50 Mo. 556. See Peck v. Jones, 70 Penn. St. 83; Johnson v. Hoffman, 53 Mo. 504. Damages to a lessee by trespasses or tortious behavior of the lessor cannot be set off against the rent. See Bartlett r. Farrington, 120 Mass. 284; Cram v. Dresser, 2 Sandf. 120; Elliott v. Aiken, 45 N. H. 30. Generally, as observed above, the claim for damages must be against the plaintiff, so that their allowance shall operate to avoid circuity of action. See Cummings v. Morris, 25 N. Y. 625; Waterman v. Clark, 76 III. 428; Taylor v. Hardin, 38 Ga. 577; Brown v. Crowley, 39 Id. 376; Stilwell v. Chappell, 30 Ind. 72; Fessenden v. Forest Paper Co., 63 Me. 175. A party generally has his election to recoup or bring a separate action; Batterman v. Pierce, 3 Hill 171; Cook v. Moseley, 13 Wend. 277. And where one endeavors to recoup and also rely upon a separate cause of action, he must usually elect; Fabbricotti v. Launitz, 3 Sandf. 743. It is an almost universal rule that the right to recoup must be specially set up in the defendant's answer: Hodgkins r. Moulton, 100 Mass. 309; Birdsall v. Perego, 5 Blatchf. 251; People v. Niagara Common Pleas, 12 Wend. 246. But see Springer r. Dwyer, 50 N. Y. 19; Babcock v. Trice, 18 Ill. 420. As a counter-claim, damages from breaches of covenant in the lease; Cook v. Soule, 56 N. Y. 420. See Morgan v. Smith, 70 Id. 537; Orton v. Noonan, 30 Wis. 611; Hay v. Short, 49 Mo. 139.







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